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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, sitting *en banc*, is reported at 500 F.2d 1188. A prior opinion of a three-judge panel of the United States Court of Appeals for the Third Circuit, which had also reversed the order of the District Court and remanded the matter for an evidentiary hearing, is reported at 484 F.2d 1277.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1245(1) (1970). The order of the United States District Court for the District of New Jersey was entered on May 9, 1973. The United States Court of Appeals for the Third Circuit granted petitioner's motion for an accelerated hearing of the appeal. The hearing was held on September 7, 1973 and on that date the three-judge panel issued a preliminary injunction against the state-court trial, pending the issuance of a full mandate. On September 10, 1973 the court issued its opinion and order reversing the order of the district court. Based upon the respondents' representation that it would not move the state-court trial pending further proceedings, the Court of Appeals recalled the mandate to allow respondents to file a motion for rehearing *en banc*. On September 21, 1973 the Court of Appeals granted their application for the rehearing *en banc*.

On July 8, 1974 the judgment in lieu of a formal mandate, reversing the order of the district court and remanding the matter to that court for findings of fact and conclusions of law was issued by the United States Court of Appeals for the Third Circuit, *en banc*. Respondents then moved to recall the mandate to allow for the filing of a petition for *certiorari* to this Court. The motion was granted on July 23, 1974 and the issuance of the mandate stayed until August 7, 1974. Respondents herein filed a petition for *certiorari*, No. 74-80, on August 6, 1974. Petitioners herein filed a cross-petition for *certiorari* on September 13, 1974.

QUESTIONS PRESENTED

1. Whether the "extraordinary circumstances" exception to the *Younger v. Harris* interdiction constitutes a distinct category supporting federal intervention in a pending state criminal prosecution?

2. Whether the facts of this case present "extraordinary circumstances" under *Younger v. Harris,* 401 U.S. 37 (1971)?

3. Whether the New Jersey Supreme Court in its interrogation of the Petitioner ten minutes before he was to appear to testify in the State Grand Jury, conducted with the aid of evidence supplied to the Court by the Deputy Attorney General conducting the Grand Jury proceedings, violated the doctrine of separation of powers provided for in both the Federal and New Jersey Constitutions and unconstitutionally deprived the Petitioner of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

4. Whether the conduct of the New Jersey Supreme Court and the Deputy Attorney General, taken in view of the organization of the New Jersey Court system, inflicted and continues to inflict irreparable constitutional injury upon the Petitioner, justifying federal intervention?

5. Whether the Court below erred in finding that the present case was not one of bad faith and in limiting the fact-finding to the coercion issue only?

6. Whether the Court below erred in finding the present case inappropriate for injunctive relief?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense."

United States Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

Constitution of the State of New Jersey, Art. 6, §2,¶3:

> "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

N.J.S.A. 2A:1B-1:

> "2A:1B-1. Definitions
>
> 'Judge' as used herein means any judge of the superior court, county court, county district court, juvenile and domestic relations court and municipal court."

N.J.S.A. 2A:1B-2:

> "2A:1B-2. Cause for removal
>
> A judge may be removed from office by the Supreme Court for misconduct in office, willful neglect of duty,

or other conduct evidencing unfitness for judicial office, or for incompetence."

N.J.S.A. 2A:1B-3:

"2A:1B-3. Institution of removal proceedings

A proceeding for removal may be instituted by either house of the Legislature acting by a majority of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court, or such proceeding may be instituted by the Supreme Court on its own motion."

N.J.S.A. 2A:1B-4:

"2A:1B-4. Prosecution of removal proceedings

The Attorney General or his representative shall prosecute the proceeding unless the Supreme Court shall specially designate an attorney for that purpose."

N.J.S.A. 2A:1B-5:

"2A:1B-5. Suspension pending determination

The Supreme Court may suspend a judge from office, with or without pay, pending the determination of the proceeding; provided, however, that a judge shall receive pay for the period of suspension exceeding 90 days."

N.J.S.A. 2A:1B-6:

"2A:1B-6. Preparation of defense; counsel; production of witnesses and evidence

The judge shall be given a reasonable time to prepare his defense and shall be entitled to be represented by counsel. The prosecuting attorney and the judge shall have the right of compulsory process to compel the attendance of witnesses and the production of evidence at the hearing."

N.J.S.A. 2A:1B-7:

"2A:1B-7. Taking of evidence

Evidence may be taken either before the Supreme Court sitting *en banc*, or before three justices or judges or a combination thereof, specially designated therefor by the Chief Justice."

N.J.S.A. 2:1B-8:

"2A:1B-8. Rules governing

Except as otherwise provided in this act, proceedings shall be governed by rules of the Supreme Court."

N.J.S.A. 2A:1B-9:

"2A:1B-9. Removal

If the Supreme Court finds beyond a reasonable doubt that there is cause for removal, it shall remove the judge from office. A judge so removed shall not thereafter hold judicial office."

N.J.S.A. 2A:1B-10:

"2A:1B-10. Suspension prior to hearing

No hearing to remove a judge from office as provided for in this act shall be held until the cause for suspension, if the cause is a result of an independent civil, criminal or administrative action against the judge, is finally decided in a tribunal in which the judge had an opportunity to prepare his defense and was entitled to be represented by counsel."

N.J.S.A. 2A:1B-11:

"2A:1B-11. Impeachment proceedings

The actions of the Supreme Court may not extend further than removal from office, but proceedings under this act shall not preclude the institution of impeachment proceedings against a judge pursuant to Article

VII, Section III of the Constitution or subjecting a judge to such criminal or penal proceedings as may be authorized by law."

Rules Governing the Courts of the State of New Jersey:

R. 1:20-2(b)—On Motion of Committee or Court.

"A committee may on its own motion and without formal complaint to it, and shall when so directed by the Supreme Court, investigate any condition or situation in the county which involves the character, integrity, professional standing or conduct of any attorney. If the committee finds evidence of unprofessional or unethical conduct it shall prepare a statement of charges, which shall be regarded as a complaint, and shall thereafter proceed in accordance with *R.* 1:20-4.

R. 1:20-4(b)—Service and Filing

"Immediately upon receipt of a complaint, the secretary shall make written acknowledgment thereof to the complainant. He shall forthwith serve a copy on the attorney named therein, either personally or by ordinary mail, and mail a copy to the Administrative Director of the Courts. The secretary shall open a separate file for each complaint and properly index it."

R. 1:20-4(c)—Answer; Preliminary Investigation.

"The attorney shall within 10 days after the service of the complaint upon him, file a written answer thereto in triplicate with the secretary, who shall thereupon forward one copy to the complainant and one copy to the Administrative Director of the Courts and then refer the complaint and answer to one or more members of the committee designated by the chairman for preliminary investigation. Such investigation shall be promptly instituted and completed by the committee member or members to whom assigned, notwithstanding the expiration of their terms prior

to the completion thereof. The committee member or members shall interview the complainant and the attorney, and conduct the investigation in such other manner it deems appropriate. Where special need therefor appears, the Administrative Director of the Courts, on the request of the chairman, may assign an official court reporter to assist in the investigation. A written report of the investigation shall be made to the entire committee, and a copy thereof forwarded to the Administrative Director of the Courts. If the attorney fails to file an answer as herein prescribed or fails to appear at the time fixed for hearing, the committee shall by letter so notify the Supreme Court, through the Administrative Director of the Courts. If the circumstances warrant, the Supreme Court may then issue an order directing the attorney to show cause why he should not be suspended pending disposition of the complaint."

R. 1:20-4(h)—Dismissal or Presentment.

"The committee shall consider and reach a determination on the matter promptly after the conclusion of the formal hearing. If it finds no unethical or unprofessional conduct, it shall dismiss the complaint, and the secretary, in writing, shall promptly so notify the complainant and the attorney, submit a written report of the committee's findings and conclusions to the Administrative Director of the Courts, and close the file in the matter. If the committee finds unethical or unprofessional conduct, the secretary shall promptly prepare an original and 9 copies of a presentment to be signed by the members of the committee concurring therein, which shall contain a summary of the matter and the committee's findings of fact. The original and 7 copies thereof together with the original and 3 copies of the transcript together with all exhibits shall be filed with the Clerk of the Supreme Court, one copy each of the presentment and transcript shall be served upon the respondent

and one copy of each shall be retained by the committee. Any members of the committee participating in the determination but not concurring in the presentment shall separately state their findings and conclusions, which statement shall be filed with, but not made a part of the presentment."

R. 1:20-4(i)—Disposition by Supreme Court.

"On the filing of the presentment the Supreme Court shall determine whether to issue an order to show cause why the respondent should not be disbarred or otherwise disciplined. If no order to show cause issues, the Clerk of the Supreme Court shall so notify the Committee and the respondent. If an order to show cause issues, it shall be served upon the respondent and filed by the committee. Within 2 weeks of the date of the order to show cause the attorney designated by the committee to prosecute the matter shall file 8 copies of his brief in support of the presentment with the Clerk of the Supreme Court and serve a copy on the respondent. Within 2 weeks of the date of service of the committee's brief, the respondent shall file with the Supreme Court 8 copies of his answering brief and serve a copy on the attorney for the committee."

R. 1:20-8—Filing of Presentment; Order to Show Cause.

"Presentments made to the Supreme Court pursuant to *R.* 1:20-4, and orders to show cause why an attorney should not be disbarred or otherwise disciplined issued by the Supreme Court, and all briefs, papers and exhibits submitted in connection therewith, shall be impounded by the Clerk of the Supreme Court and shall not be filed of record unless the Supreme Court otherwise orders or unless and until the attorney presented or ordered to show cause is disbarred or otherwise disciplined by the Supreme Court."

STATEMENT OF THE CASE

This is a case *sui generis*. Research has failed to discover anything similar on its facts and perhaps, nothing comparable will ever again arise in this or any other court. This case is brought before this Court for the review of an order granted pursuant to *Rule* 12(b)(6) and thus every allegation of the verified petition originally filed by Petitioner Helfant must be taken as true. *Littleton v. Berbling*, 468 F.2d 309, 329 (7th Cir. 1972); *Hackett v. McGuire Bros.*, 445 F.2d 422 (3rd Cir. 1971). Furthermore, this case is brought before the Court on a very limited record, a point which must be stressed. The only testimony taken was that of the Petitioner and Patrick T. McGahn, Jr., one of this co-counsel. The testimony was taken on May 9, 1973 on the return day of Petitioner's order to show cause why a preliminary injunction against the state criminal prosecution should not issue. This testimony may be found in the joint appendix herein (App. 69).*

The procedural posture of this case and the dearth of the record must be stressed because the petition in No. 74-80 is replete with factual statements that are *dehors* the record, evasions, conjecture and speculation. Petitioner is reluctant to say this, yet a simple comparison between the statement of facts in the Third Circuit *en banc* opinion and that contained in petition No. 74-80 illuminates the point. The differences, evasions, conjecture, speculation, misstatements of fact *dehors* the record and misstatements of existing facts, will be taken up below as part of the factual and legal exposition.

* To clarify any references to petitions, addendums and joint appendix, the addendum in the cross-petition for certiorari in No. 74-277 will be cited AH for Addendum-Helfant. When referring to the addendum in petition for certiorari No. 74-80, reference will be to AK, for Addendum-Kugler. All references to page numbers in No. 74-277 will be PH, while references to page numbers in 74-80 will read PK. All references to the joint appendix will read *App.*

The material facts of this case are a matter of record, and may be found in the verified complaint and the testimony taken in the district court. Petitioner Helfant is a member of the New Jersey Bar and municipal court judge currently on leave of absence from that position (App. 82-83). In his verified complaint dated May 2, 1973 (App. 60) Helfant alleged that some time before October 18, 1972 the State of New Jersey began a Grand Jury investigation. As part of its duties, the specially created State Grand Jury was directed to investigate among other matters, an alleged illegal withdrawal of an indictable criminal charge of atrocious assault and battery in which the petitioner was alleged to have participated. The complaint had been filed in the Municipal Court of Egg Harbor, New Jersey. The State Grand Jury investigation in this matter was personally conducted by one of the defendants herein, Joseph A. Hayden, Jr., a Deputy Attorney General of the State of New Jersey.[1] It was alleged that Helfant represented one of the complainants who caused the complaint to be filed, that it was illegally and improperly dismissed with his help, and that Helfant actually witnessed the withdrawal signature.

It was in connection with this matter and other matters that the Petitioner, pursuant to a subpoena, appeared before the New Jersey State Grand Jury on October 18, 1972. At this time Helfant was advised that he was the target of the investigation. Upon learning of this, he refused even to go into the Grand Jury room. Accompanied by counsel, he was ordered to appear before the Assignment Judge of Mercer County, New Jersey, to determine whether, in fact, he should go into the Grand Jury room. The Assignment Judge directed Helfant to go into the Grand Jury room and, if Helfant so chose, to then rely

1. Mr. Hayden has subsequently left the Attorney General's Office and is currently engaged in private practice.

upon his Fifth Amendment rights. The Petitioner on the same date unsuccessfully appealed this ruling to the Superior Court of New Jersey, Appellate Division, and unsuccessfully attempted to appeal to the New Jersey Supreme Court. Unable to do this, he then appeared before the State Grand Jury, invoked his Fifth Amendment rights, and refused to answer any questions. Subsequently, while co-counsel Marvin D. Perskie was on vacation, a letter was directed to his partner Patrick T. McGahn, Jr., co-counsel, which indicated that Helfant was again subpoenaed to appear before the State Grand Jury on November 8, 1972 and would likewise invoke his Fifth Amendment rights at that time (App. 170).

On November 6, 1972 Helfant returned a telephone call that his office received from the Administrative Director of the New Jersey Courts. This call was made to Helfant personally, not to either of his attorneys, notwithstanding the fact that Helfant had appeared on October 18, 1972 represented by counsel. The Director informed Helfant that he was to appear before the New Jersey Supreme Court in private session on November 8, 1972 at ten minutes before ten o'clock in the morning. Helfant advised the Director that he had to be before the State Grand Jury at 10:00 A.M. The Administrative Director replied that he was well aware of that fact. He would not tell Helfant the reason for the meeting though asked to do so.

On November 8, 1972 the Supreme Court sat in private session at its chambers at the New Jersey State House Annex in Trenton, New Jersey. At the other end of the hall was the meeting room for the State Grand Jury, which was then in session.

The Petitioner appeared at the appointed time on November 8th. He was preceded into the New Jersey

Supreme Court chambers by Deputy Attorney General Hayden, who was carrying a file which now for the first time the State has revealed to be the raw grand jury minutes.[2] Helfant entered the chambers and was confronted by the Court sitting in its robes. The bench and bar of the State of New Jersey were well aware, as was Helfant, of the Chief Justice's attitude toward the use of the Fifth Amendment by attorneys and public officers. This attitude was amply expressed in *State v. Falco*, 60 N.J. 570, 292 A.2d 13 (1972) in which the Chief Justice, whom Helfant was about to meet, took issue with the policy of the United States Supreme Court that led to the decisions in *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Spevack v. Klein*, 385 U.S. 511 (1967).

Various members of the Supreme Court began to question him. The Chief Justice immediately inquired of the defendant whether he thought a judge should invoke the Fifth Amendment. Justice Sullivan asked what the defendant's feelings were about a judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before the Grand Jury. He also asked Helfant if he had sat as a judge since invoking the Fifth Amendment. The Chief Justice then resumed the questioning, asking Helfant questions about incidents that had been brought before the State Grand Jury and had not been made public. For example, the Chief Justice asked whether Helfant had knowledge of an ice machine that was alleged to have been illegally given to a New Jersey County Court judge. He also asked what part had Abe Schusterman, a convict who testified against Helfant in the Grand Jury, in supplying certain liquor for the Bar Mitzvah of Helfant's son. The Chief Justice also asked

2. The State has admitted in its Petition for Certiorari in No. 74-80 that the Chief Justice requested the raw grand jury minutes and the exhibits which were given to the Chief Justice (PK, 13).

about the seating arrangements at the Bar Mitzvah and who had been present. These incidents were contained in those very grand jury minutes that the Court had requested and obtained from respondent Hayden. The Chief Justice only cut off discussion about the merits of the matter in which Helfant was alleged to be involved, when Helfant tried to explain why he had previously resorted to the Fifth Amendment. The true coercive purpose of the Court was borne out by the very last question posed to Helfant by the Chief Justice: "What do you intend to do today?"

Samuel Moore, Helfant's co-defendant,[3] had also been called to the Supreme Court chambers after Helfant left. With him, he brought the original complaint which allegedly had been improperly dismissed. This is and was the central exhibit in the entire prosecution. There was affixed to the complaint a signed withdrawal allegedly witnessed by Helfant. Helfant's signature was at issue and had been the subject of expert testimony before the State Grand Jury. The Chief Justice proceeded to discuss with Moore the validity of Helfant's signature with the complaint spread out before the Court. Furthermore, the Chief Justice asked Moore about the reliability of certain law firms in Atlantic City, New Jersey which were involved in the case. In short, the New Jersey Supreme Court was considering the main exhibit in a criminal case and investigating the validity of Helfant's signature allegedly thereon, *i.e.*, the minutes of the grand jury investigation. This completely belies the allegation of the State that the Court was merely attempting to determine whether the two judges intended to remain on the bench in their temporary positions.

3. Judge Moore has subsequently died. He was not a "critical witness" as the State has characterized (PK, 62), but a co-defendant!

Helfant then emerged from the chambers. His co-counsel, who testified before the Federal District Court, dramatically described Helfant's demeanor and appearance when he emerged. Helfant was very, very upset and appeared completely white and shaken. Counsel, as stated in the record, simply could not get through to him. Against the vigorous protests of both co-counsel, Helfant indicated he would testify because he was fearful that failure to do so would result in the loss of his license to practice and of his two judgeships. Obviously, the experience and encounter with the Supreme Court had had its intended effect. Helfant's will was broken, his resolve shattered. He was literally frightened beyond the reach of legal advice. His determination shaken, the entreaties of his lawyers to no avail, Helfant walked the very short distance between the Supreme Court chambers to the grand jury room down the hall, appeared before the State Grand Jury and testified.

Prior to Helfant's testimony, the State had called before the State Grand Jury and intended to recall as witnesses, three convicted criminals who were then in State prison: John Cantoni, Sheldon Kravitz and Abe Schusterman.[4] Helfant knew that they had testified against him. Thus, when he was called before the State Grand Jury he was in an inextricable position: once he testified, and if he agreed with their testimony, he implicated himself in an alleged criminal conspiracy; if he disagreed with them, he was subject to a charge of false swearing. This was the manner in which the Grand Jury was being conducted by

4. Each one of whom received promises of immunity for their appearances and other substantial concessions and promises of recommendations for doing so, which has been admitted by the State in discovery furnished in the State criminal proceedings. As a matter of fact, Kravitz and Schusterman are now at liberty as a result of the intercession of the Attorney General's Office. Kravitz has returned to the bar business, his disqualification to hold a liquor license removed.

Deputy Attorney General Hayden and this was the procedural framework facing Helfant when he testified on November 8, 1972. The result of Helfant's testimony was an indictment charging him with conspiracy to obstruct justice, obstruction of justice, compounding a felony and four counts of false swearing.

Helfant then attempted to exhaust, to the extent available, his State court remedies with regard to the constitutional rights now raised before this Court. Initially, Helfant moved before the trial court to dismiss the indictment based upon the illegal conduct of both the New Jersey Supreme Court and the Deputy Attorney General. That motion was denied. Since the order was interlocutory in nature, there was no right of direct appeal under New Jersey law. *See, R.* 2:5-6. Under this rule, Helfant made application to the Appellate Division of the Superior Court of New Jersey, the intermediate appellate tribunal in the State of New Jersey. The Appellate Division denied the motion under *R.* 2:2-4. Helfant then moved for leave to appeal before the New Jersey Supreme Court, which motion was denied by the Supreme Court over the signature of Chief Justice Joseph Weintraub, a respondent herein (App. 42-59).

As a result of the actions of the New Jersey Supreme Court and Deputy Attorney General Hayden, on May 2, 1973 Helfant filed a verified complaint and order to show cause in the United States District Court for the District of New Jersey. The gist of his complaint may be summed up in Paragraph 14 thereof:

> "14. As a result of the intrusion by the Deputy Attorney General and the disclosure of the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation and because of the intrusion of the New Jersey Su-

preme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State Government. Plaintiff is being made to defend criminal charges which have been obtained, *inter alia*, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the "interest" of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he alleges had unlawfully injected itself into the prosecution of the charges aginst him and unlawfully deprived him of his constitutional rights. *The conclusion must be that the State is engaged in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under* 28 U.S.C. §2283 (App. 66-67) (emphasis added).

The return date of the order to show cause was May 9, 1973. On that date testimony was taken of Helfant and Patrick T. McGahn, Jr., one of his co-counsel who

was present on November 8, 1972. Some of that testimony has been cited in the Court of Appeals' *en banc* decision (App. 130-31). In essence, Helfant testified consistently with the averments of his complaint and the overwhelming and devastating effect that the encounter with the Justices had upon him. Mr. McGahn testified that Helfant had intended to take the Fifth Amendment on November 8th prior to entering the Supreme Court chambers and told how Helfant emerged shaken and distraught from the chambers and, against the advice of both counsel, and as a result of this encounter, informed counsel that he would testify.

In an oral opinion, the district court denied preliminary injunctive relief on the ground that *Younger v. Harris*, 401 U.S. 37 (1971), precluded federal intervention. It also granted the State's motion and dismissed the complaint for failure to state a claim for which relief might be granted. As the *en banc* opinion recognized, the case came to it subsequent to a *Rule* 12(b)(6) motion.[5] As it further recognized, although an evidentiary hearing on the injunction request had been conducted and the court had made limited findings on this issue,

> ". . . it did not find facts with respect to the merits of Helfant's §1983 claim. Thus, there have been no fact findings on the crucial issue of whether Helfant's testimony before the grand jury was the product of his free and unconstrained will"[6]

Thus, as the Court of Appeals recognized and as must be stressed herein, there was only a limited record made below. Only Petitioner introduced testimony, and this testimony was wholly corroborative of his complaint. The

5. *Helfant v. Kugler*, 500 F.2d 1188, 1192 (3rd Cir. 1974).
6. *Ibid.*

State did not introduce any testimony and did not in any way seek to refute the material allegations of the complaint. To this date, unde the facade of a flurry of legal maneuvers, it has continued to avoid an examination of the facts within its control. Therefore, as the *en banc* decision below recognized "we must take as true Helfant's allegations . . . ."[7]

The case was in this procedural posture when it was brought before the three-judge panel on September 7, 1973. In an order dated September 10, 1973 and in an opinion, the three-judge panel reversed the order of the district court. Its holding first recognized that there was a distinct and separate category of "extraordinary circumstances" under *Younger* and that the present fact situation came within that special category (App. 114). It said:

> "Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law. If the circumstances here alleged do not fall within that category, it would be difficult to imagine any that would. If it is true that Helfant is being tried on an indictment which resulted from his testimony before the grand jury coerced from him by the Supreme Court of New Jersey, his Fifth Amendment privilege against self-incrimination has already been violated, and the effect of that violation is, by virtue of the ongoing prosecution, continuing. Since the Supreme Court of New Jersey is accused of having exercised the coercion, a remedy in the courts of New Jersey and ultimately in that Court, hardly seems adequate" (App. 115).

Subsequent to this opinion, the State petitioned for a rehearing *en banc*. In an order dated October 31, 1973 the petition for rehearing before a three-judge panel was granted and the court ordered supplemental briefing on

7. *Ibid.*

the coercion issue (App. 120-21). Subsequent to the filing of the supplemental briefs, the court, in an order dated January 11, 1974, relisted the case for a rehearing before the Court of Appeals, *en banc* (App. 122). On April 10, 1974 the appeal was argued (App. 124). The opinion of that court was filed July 8, 1974. The opinion also reversed the order of the District Court and reinstated the complaint. Considerably narrowing the scope of the relief sought, however, the court remanded the case to the United States District Court for proceedings, "limited to a determination of whether Helfant's testimony before the State Grand Jury on November 8, 1972 was a product of free and unconstrained will." It ordered that the district court "issue a declaratory judgment setting forth this conclusion."[8]

The *en banc* opinion also recognized that there was a separate and distinct category of "extraordinary circumstances" under *Younger v. Harris, supra.*[9] It found that a predicate of *Younger* was an assumption that the defense of the pending state prosecution would afford an adequate remedy at law for vindication of any federal constitutional rights at issue. The court thus predicated "extraordinary circumstances" to an "inability of the state forum to afford an adequate remedy at law."[10]

The certified judgment in lieu of mandate embodying the decision of July 8, 1974 was filed by the court on that date (App. 166). The State then again petitioned the court to recall its judgment in lieu of formal mandate and to clarify its opinion regarding the four counts of false swearing contained in the State's indictment. In an order dated July 23, 1974 the Court of Appeals recalled its certified judgment in lieu of mandate and stayed the issuance

8. *Id.* at 1198.
9. *Id.* at 1193.
10. *Ibid.*

thereof until August 7, 1974. The other relief requested was denied.

Thereafter, on August 6, 1974 respondents herein filed their petition for *certiorari*, No. 74-80. On September 13, 1974 petitioner herein filed his cross-petition for *certiorari*. Both petitions were granted on November 18, 1974.

In conclusion, this case comes before this Court after two hearings in the United States Court of Appeals for the Third Circuit and after two opinions entered in that Court in favor of petitioner. Furthermore, this case comes before the Court subsequent to the granting of a *Rule* 12(b)(6) motion and upon a limited record consisting of testimony wholly favorable to the contentions of the petitioner. It is respectfully submitted that the allegations of the complaint, supported by the testimony below, show that this is a case of "extraordinary circumstances," justifying Federal intervention by way of injunction in the State court proceedings. Further, as the record indicates, this is a case in which there has been manifest bad faith on the part of the State, both in the inception of the prosecution against Helfant and the manner in which it was handled. It is respectfully submitted that this is a case for Federal injunctive relief to cure, by way of prophylactic rule, massive due process, Fifth Amendment and Sixth Amendment violations found in the State's prosecution of Helfant.

SUMMARY OF ARGUMENT

This case brings before the Court a factual complex that is probably *sui generis*. Alleged in the complaint are allegations that the highest court of the State of New Jersey collaborated with a Deputy Attorney General conducting an on-going State Grand Jury investigation to coerce the petitioner Helfant, through a procedure entirely devoid of due process, into foregoing his Fifth Amendment rights. It is further alleged, and admitted by the respondents, that in pursuance of its aim, the court demanded, received, and improperly considered grand jury minutes and exhibits of a grand jury investigation which was then confidential and had not been concluded.

It is further alleged that the same Deputy Attorney General divulged raw grand jury data to the court in violation of and in contradiction to the doctrine of separation of powers, *N.J. Const.* Art. III, §1 (1947), and the New Jersey cases, rules and statutes. This was prosecutorial misconduct and in itself constituted a further violation of due process. Lastly, petitioner alleges violations of his Fourteenth Amendment procedural due process rights and Sixth Amendment right to a fair trial and counsel arising out of the unlawful procedure utilized by the New Jersey Supreme Court to "investigate" alleged judicial misconduct by Helfant. In essence, the factual complex literally presents a "breakdown of the State judicial system . . . ." *Allee v. Medrano*, — U.S. —, 94 S. Ct. 2191, 2210 (1974) (Burger, Ch.J., concurring). The complaint charges that Helfant, as an individual, is being deprived of "meaningful access to the state courts . . . ." *Ibid.* Also implicit is the right of an individual to be tried in a state court system without even the hint of impartiality. Thus, some of the basic tenets of our democratic system are being brought into question.

What is involved here is illegitimate abuse of state power and a resort to our federal court system to correct the abuse. This is the situation in which the appearance of impartiality, the appearance of justice, mandates federal court interference with the State court's procedure. It is submitted that the present case represents "extraordinary circumstances" under *Younger v. Harris*, 401 U.S. 37 (1971) and that such "extraordinary circumstances" represents a distinct category supporting federal intervention in a pending state criminal prosecution. It is further submitted that if this case is not considered to be "extraordinary circumstances" then no case ever will, and the language found in the cases supporting the proposition that "extraordinary circumstances" represents a separate category allowing intervention will henceforth be of no further legal effect.

In 1971, *Younger v. Harris, supra*, and its companion cases were decided. These cases dealt with the appropriateness of federal injunctive and declaratory relief in an ongoing state prosecution. *Younger* expressed no view about the circumstances under which federal courts could act when there was no prosecution pending in State courts at the time that the federal action was begun, 401 U.S. at 41. Its companion case, *Samuels v. Mackell*, 401 U.S. 66, 73-74 (1971) reserved decision on the propriety of declaratory relief when no State proceeding was pending at the time the federal suit was begun. These questions were answered in *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974) in which the court held that federal declaratory relief was not precluded when no state prosecution was pending and a federal plaintiff demonstrated a genuine threat of enforcement of a disputed state criminal statute, whether the attack was made on the constitutionality of the statute on its face, or as applied.

The present case brings before this Court the opportunity to further clarify the *Younger* cases. The question presented by this case is whether *Younger* and its companion cases, arising as they did in the area of the First Amendment, sought to be the last word on the law of federal injunctions against pending state criminal proceedings?

Historically, the *Younger* cases arose in a time when a great number of lower federal courts had greatly extended the holding of *Dombrowski v. Pfister*, 380 U.S. 479 (1965) to encompass situations totally distinguishable from the extreme situation that had given rise to that opinion. Furthermore, while *Dombrowski* had spoken of proving both facial invalidity and bad faith before the federal injunction could issue, lower federal courts were reading this opinion in the disjunctive, to allow intervention if there was a question either of facial invalidity or bad faith.

Thus, the *Younger* cases served to once again clarify the law, and to temper the tendency of the lower federal courts to place an expansive interpretation on *Dombrowski*. *Younger* settled the question, holding that facial invalidity alone could never suffice to allow intervention—even if there was a residuary chilling effect upon First Amendment rights—as long as enforcement of the statute was in good faith and without harassment. Ordinarily, the defense to the criminal prosecution in this instance would suffice to vindicate the First Amendment rights implicated. In terms of comity, good faith enforcement of what could conceivably be an invalid statute was a legitimate state function in which the federal courts would not interfere. Thus was *Dombrowski* clarified and guidance given to the lower federal courts *in the First Amendment area*.

Thus, *Younger* recognized the confusion that had arisen in the First Amendment area and directed itself to

clarify the law in that particular factual situation. Understanding its limitations, the opinion sought to give further guidance and not foreclose future development. "Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be."[11]

The present case brings before this Court the "unusual situation." On its facts, this case is extraordinary. It implicates the highest court of the State of New Jersey in a collusive scheme with a Deputy Attorney General to subject Helfant to an unconstitutional interrogation for the avowed purpose of coercing him into foregoing his Fifth Amendment rights. It presents massive violations of due process, and a conscious attempt to deprive Helfant of counsel, in derogation of his Sixth Amendment rights.

On its facts, this case brings before this Court the opportunity to find that "extraordinary circumstances"[12] does constitute a separate category allowing federal intervention in a state criminal proceeding. If these facts are not "extraordinary" then, it is submitted, what could ever be?

11. *Younger v. Harris*, 401 U.S. 37, 54 (1971).
12. *Id.* at 53-54.

ARGUMENT

POINT I

An "extraordinary circumstances" exception to the *Younger v. Harris* interdiction constitutes a distinct category supporting federal intervention in a pending state criminal prosecution.

As petitioner has repeatedly emphasized, the present case comes before this Court, as it twice came before the United States Court of Appeals for the Third Circuit, after the granting of a *Rule* 12(b)(6) motion. Thus, this Court must liberally construe the complaint and consider all of its allegations to be true. All doubts are to be resolved in favor of petitioner. *Littleton v. Berbling*, 468 F.2d 309, 329 (7th Cir. 1972); *Hackett v. McGuire Bros.*, 445 F.2d 322 (3rd Cir. 1971). As this Court has repeatedly emphasized, the standard in judging the complaint on appeal and the merits of the underlying action, in the present procedural context, is whether the action is so patently without merit as to justify dismissal of the complaint. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). Thus, the allegations of the complaint are entirely true for the purpose of this case. Furthermore, it must again be noted that the only testimony taken on the return date of the order to show cause, May 9, 1973, was that elicited by petitioner's witnesses and that this testimony currently remains uncontradicted on the record.[13]

13. This is a crucial fact which cannot be overstressed in this Petition. Petition No. 74-80 was replete with evasions, conjecture, speculation and many statements of fact which are not in the record below. First, there is nothing in the record which discloses that Helfant's appearance before the Grand Jury "received some public notoriety and was disclosed in several newspapers in the state" (PK, 13). Furthermore, there is nothing in the record indictating that the Administrative Director of the New Jersey Courts in accordance with "settled practice" informed the Supreme Court of this

Under 28 U.S.C. §1343(3) (1970) federal courts have subject matter jurisdiction of an action commenced "[t]o redress the deprivation, under color of state law . . . custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . ." 42 U.S.C. §1983 (1970) affords the federal suitor a remedy to bring "an action at law, suit in equity, or other proper proceeding for redress." And, this Court has held that this may be by means of injunction, *Mitchum v. Foster*, 407 U.S. 225 (1972) or by declaratory judgment, *Steffel v. Thompson*, 415 U.S. 452 (1974). Thus, there is no constitutional barrier, and since *Mitchum v. Foster, supra*, no absolute Congressional barrier, to federal court intervention in state criminal proceedings.

While there is no doubt that in the delicate area of federal-state relations the cases have generally held that the trial of criminal cases under state law should be left to the state courts, *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951); *Douglas v. City of Jeannette*, 319 U.S. 157, 162-

(Id.). Neither is there anything indicating that the Administrative Director was instructed to obtain a report from the Attorney General handling the matter and all relevant Grand Jury testimony (Id.). There is also nothing in the record below indicating that the New Jersey Supreme Court had directed the Administrative Director to ask both Helfant and Moore to meet with it in a private conference room on that date. There is nothing in the record indicating what the purpose of this meeting was to be (Id.). Nor was there anything in the record which indicates that the New Jersey Supreme Court is duty bound to inquire into allegations of judicial misconduct and that these investigations do not generally await the conclusion of pending or related criminal charges. Nor does anything in the record indicate that the New Jersey Supreme Court often takes preliminary steps to determine whether disciplinary proceedings are required prior to disposition of a criminal cas (PK, 27). These misstatements cannot be over-emphasized. It is indeed sad that the State has seen fit to so destroy the actual record in this case and bring so many innuendoes and actual misstatements before this Court. Helfant takes no issue with the power of the Supreme Court of New Jersey to supervise the Judges and administer the Court system of the State nor with its power to discipline members of the bench and bar. However, a hearing on judicial impropriety without notice, without counsel, without a fair hearing, held ten minutes before a Grand Jury proceeding, finds no support in Court Rules, State Statutes, Constitutional Law or, for that matter, in anything in the American system of jurisprudence.

63 (1943), there is also no doubt, and history has recognized, that such interference has oftentimes been necessary. *See, Mitchum v. Foster,* 407 U.S. 225, 241-42 (1972).

The conditions which could support such interference prior to *Younger v. Harris* were set forth in *Dombrowski v. Pfister,* 380 U.S. 475 (1965). *Dombrowski* was generally recognized to sanction federal interference in state prosecutions in two distinct situations: (1) when a criminal prosecution was brought under a law facially invalid due to vagueness or overbreadth. Here the action was deemed to have a "chilling effect" upon the exercise of constitutionally protected rights. Thus, remedy by way of defense to the prosecution would be inadequate to protect those rights; (2) when the prosecution was brought in bad faith for the purpose of inhibiting the exercise of constitutional rights, the prosecution itself caused the injury.[14] In either instance, "irreparable injury" was said to exist. Thus, both injunctive and declaratory relief would be authorized, since the defense to the prosecution—the adequate remedy at law—would be insufficient to protect the constitutional right involved.[15]

Although *Dombrowski* appeared to speak of the necessity of proving both "facial invalidity" of the statute and "bad faith" in its enforcement, later cases appeared to speak of the requirements in the disjunctive, *i.e.*, proof of either would suffice to allow federal intervention. *See, e.g., Cameron v. Johnson,* 390 U.S. 11 (1968). Thus, it was in this context that *Younger v. Harris,* 401 U.S. 37 (1971) and its companion cases were brought before the Court.[16]

14. 380 U.S. at 486-89.

15. It had long been recognized that "equity does not generally enjoin criminal prosecutions, because there is an adequate remedy at law by way of defense to the prosecutions. . . ." *See e.g., Ivy v. Katzenbach,* 351 F.2d 32 (7th Cir. 1965).

16. The others were *Samuels v. Mackell,* 401 U.S. 66 (1971); *Boyle v. Landry,* 401 U.S. 77 (1971); *Perez v. Ledesma,* 401 U.S. 82 (1971); *Dyson v. Stein,* 401 U.S. 200 (1971); *Byrne v. Karalexis,* 401 U.S. 216 (1971).

First, the Court stressed that, as in all situations involving the interplay of federal-state relations, the notion of comity, *i.e.*, a proper respect for state functions, was a valid consideration. As was said, however, adherence to notions of comity did not mean

> . . . blind deference to 'States' rights' any more than it means centralization of control over every important issue in our National Government and its courts. * * * What the concept does represent is a system in which . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. 401 U.S. at 44.

With this consideration in mind, the Court then went on to define the instances when a federal court could interfere with pending state criminal proceedings.

The Court first held that the facial invalidity of the statute under which a state criminal prosecution had been instituted no longer provided a basis alone for federal intervention. The Court also held that the mere allegation of a chilling effect because of the alleged facial invalidity, even if true, would not of itself constitute irreparable injury so as to entitle the federal plaintiff to federal equitable relief. The Court instructed that generally irreparable injury would not be found if the threat to federally protected rights could be protected by the defense against a single criminal prosecution,[17] *i.e.*, the state court could afford an adequate remedy at law. Thus, generally, only in cases of "exceptional circumstances"[18] would a court grant federal injunctive relief. "Exceptional circumstances" did not mean a good-faith prosecution brought

17. 401 U.S. at 46.
18. 401 U.S. at 46-48.

under a statute perhaps facially invalid. Rather, it meant illegal seizures, arrests and threats of prosecution merely to harass plaintiffs and discourage them from asserting constitutional rights;[19] in other words, those very circumstances that had been evident in *Dombrowski.*[20] The possibility of a chilling effect, by itself, would not be enough. Circumstances would have to exist, as in *Dombrowski,* to show that there was bad faith by the prosecutorial authorities in the enforcement of the law. In short, the good faith attempt to enforce a questionable statute would not warrant intervention.

In this formulation the Court was thus setting forth those "exceptional circumstances" that could suffice to prove the irreparable injury necessary to support federal intervention in the ordinary case. In terms of comity, if the plaintiff could show an illegitimate activity of the state, then it could not be said that the federal court was unduly interfering with any legitimate state function. As Justice Stewart pointed out:

> . . . if there has been . . . official lawlessness . . . the reasons of policy for deferring to state adjudication are out weighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights. 401 U.S. at 56 (Stewart, J. concurring).

Lastly, the *Younger* opinion pointed out that its dictates were by no means a complete last word on the situations in which a federal court could interfere in a state criminal proceeding. It observed that there could be "extraordinary circumstances in which the necessary ir-

19. 401 U.S. at 48.
20. *Ibid.*

reparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."[21] The Court then cited *Watson v. Buck*, 313 U.S. 387, 407 (1941) as an example for such extraordinary circumstances, at least within the area of statutory challenge.[22]

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Court recognized that even this situation could not be the last word, since it gave guidance only in the statutory area. It said, "Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be."[23] This theme was reiterated in *Perez v. Ledesma*, 401 U.S. 82 (1971), a companion case in which the federal plaintiffs sought relief by way of declaratory judgment and injunction against their state prosecutions under state obscenity statutes. Neither bad faith nor harassment had been alleged. Further, the challenge was only to the facial validity of the statute. Reaffirming its holding in the companion cases, the Court found that federal interference had been unwarranted. "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction," was relief warranted. Again, this was not the last word:

> [P]erhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive

21. *Id.* at 53. In other words, bad faith and harassment is one form of irreparable injury, but only one form. Irreparable injury could be established through other facts.

22. *Id.* at 53-54.

23. *Ibid.*

> relief against pending state prosecutions appropriate. 401 U.S. at 85.

The above analysis, it is submitted, demonstrates that *Younger* and its companion cases sought by no means to serve as the absolute last word on the law of federal injunctions against state criminal prosecutions, or to foreclose further development of the law in this area. These cases, all arising in the First Amendment area, and all involving challenges to the statutes under which the federal plaintiffs were being prosecuted in the state courts,[24] must be read in the specific factual context in which they arose. They sought to clarify the existing law in that area, particularly that arising after *Dombrowski*. Thus, in the First Amendment area, only in "exceptional circumstances," where bad faith and harassment could show the necessary irreparable injury, would a federal court be allowed to step in. Obviously, there could be other situations, exclusive of the First Amendment area, involving other important Constitutional rights—in other words of *Younger*, "unusual" or "extraordinary"—that could also warrant federal intervention, if irreparable injury could also be shown. Simply put, *Younger* arising as it did in the area of freedom of expression, could not be a foreclosure of a resort to the federal court to protect all the other rights guaranteed by the Constitution and Bill of Rights.[25]

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24. *Younger v. Harris* (challenge to State statute under which the defendant was being prosecuted); *Perez v. Ledesma* (declaratory judgment against state statute and injunctive relief against its enforcement sought); *Boyle v. Landry* (challenge to constitutionality of statute); *Dyson v. Stein* (indicted defendant challenged statute); *Samuels v. Mackell* (indicted defendants seek declaration of unconstitutionality of statute under which they were prosecuted); *Byrne v. Karalexis* (challenge to statute on constitutional grounds after indictment).

25. This was the conclusion of the commentators writing soon after the *Younger* opinions issued. *See, e.g., Sedler, Dombrowski In the Wake of Younger, The View From Without and Within*, 1972 *Wisc. L. Rev.* 1, 13-26 (1972), *Note*, 85 *Har. L. Rev.* at 303 (1971).

That being so, in what other situations would the federal court intervene? The *Younger* opinion itself, as well as statements in later cases, give guidance.

First, *Younger* cited *Watson v. Buck, supra,* as an example of an extraordinary situation.[26] Here, the Court speaks in terms of a flagrantly unconstitutional statute, one that could never be constitutionally applied. The first criterion thus arises: flagrant unconstitutionality. Later cases give further guidance. In *Allee v. Medrano,* — U.S. —, 94 S. Ct. 2191 (1974) appellee union committee and individual appellees, who had attempted to unionize farm workers, were subject to persistent harassment and violence by appellants, who were Texas Rangers, members of a sheriff's department and a justice of the peace. Appellees brought a federal civil rights action attacking the constitutionality of certain Texas statutes and alleging that the appellants and others had conspired to deprive appellees of their First and Fourteenth Amendment rights. A three-judge district court declared some of the statutes unconstitutional and enjoined their enforcement and permanently enjoined appellants and other from intimidating appellees in their organizational efforts.

This Court affirmed that portion of the district court's decree that had enjoined the illegal police conduct.[27] *Cf., Lewis v. Kugler,* 446 F.2d 1343 (3d Cir. 1971). It recognized that federal courts "have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied."[28] Where as in this case, there was persistent police misconduct, the Court found injunctive relief appropriate.[29]

26. 401 U.S. at 53-54.
27. 94 S. Ct. at 2201.
28. *Id.* at 2200, quoting from *Cameron v. Johnson,* 390 U.S. 611, 620 (1968).
29. *Ibid.*

Chief Justice Burger filed a lengthy opinion, concurring in part and dissenting in part from the opinion of the Court. First, he recognized that under *Younger* a federal plaintiff must prove irreparable injury, which he felt must include "except in extremely rare cases," bad faith and harassment.[30] He cited with approval the language of *Perez v. Ledesma, supra,* which recognized that "extraordinary circumstances" was a separate category for federal intervention as long as irreparable injury could be shown.[31] He then postulated his theory of the circumstances under which resort to federal intervention could be supported.[32]

Basically, Justice Burger spoke of a "breakdown of the state judicial system. . . ."[33] That is what had happened in *Dombrowski.*

> The courts had lost control of a prosecutor embarked on an alleged campaign of harassment of appellants, designed to discourage the exercise of their constitutional rights. Under such circumstances, federal intervention would be authorized. 94 S. Ct. at 2210.

In such a situation, in his opinion, the individual is "deprived of meaningful access to the state courts . . . .,"[34] and thus suffers the irreparable injury necessary to support intervention. Furthermore, he is being deprived of an adequate remedy at law by way of a defense in the state court because of the inability of that forum to adequately protect the constitutional rights involved.

Indeed, Justice Burger was speaking of the ordinary case when speaking of the "breakdown of the state judicial

30. 94 S. Ct. at 2209. In this statement he affirms the thesis of this brief that irreparable injury need not always be "bad faith and harassment." Other forms of irreparable injury could be made out.
31. *Id.* at 2210.
32. *Ibid.*
33. *Ibid.*
34. *Ibid.*

system . . . ," the case where certain prosecutorial officials alone were engaged in the misconduct. *Cf., Dombrowski v. Pfister, supra.* Taking this as the norm, the "extraordinary" case could be one where the state judiciary itself was involved in the repression of constitutional rights. Here, there could be no question that the only meaningful forum would be the federal court. *Cf., Perez v. Ledesma,* 401 U.S. 82, 84-85 (1971). While a state court "is presumed to be capable of fulfilling its 'solemn responsibility' . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ,"[35] the presumption dissolves when it is alleged that the state judiciary itself is involved.[36]

In *Fenner v. Boykin,* 271 U.S. 240, 244 (1926) it was said,

> The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that course would not afford *full* protection (emphasis added).

"Full protection" must mean an ability to present the defense, and all constitutional claims, to a fair and unbiased judiciary. *See, In re Murchison,* 349 U.S. 133, 136 (1955); *Toomey v. Ohio,* 273 U.S. 510 (1927). Thus, "extraordinary circumstances" could, and should encompass this type of situation.[37] This argument gains force when it is remembered that a predicate of *Younger v. Harris* was an assumption that a defense to the state prosecution would provide an adequate remedy at law for the vindication of the particular constitutional rights involved.[38]

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35. *Ibid.*

36. Federal officials have even been subject to injunction. *See, e.g., Wolff v. Selective Serv. Local Bd. No. 16,* 372 F.2d 817 (2d Cir. 1969).

37. As was said in *Hobbs v. Thompson,* 448 F.2d 456, 465 (5th Cir. 1971), "The opinion [in *Younger*] does not purport to require across-the-board abdication of federal decision-making power in all manner of cases."

38. *Helfant v. Kugler, supra,* 500 F.2d at 1193.

In conclusion, in light of the language of *Younger* itself, and its interpretation by subsequent cases[39] and commentators,[40] there can be no doubt that "extraordinary circumstances" does constitute a separate exception to the *Younger v. Harris* interdiction.

As will be discussed below, petitioner has come to the federal court seeking vindication of substantial constitutional rights, alleged to have been violated by six of seven New Jersey Supreme Court Justices. As petitioner will show below, the court, and especially the Chief Justice, exert tremendous power over the lower state judiciary and bar. As will be shown below, both the executive and judiciary engaged in conduct calculated to subvert petitioner's constitutional rights, which was successful, causing him great irreparable injury. As will be shown below, "extraordinary circumstances" exist in this case and warrant a federal injunction.

POINT II

The facts of the present case, involving the deprivation of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the collusion of the State Supreme Court and deputy attorney general present "extraordinary circumstances" under *Younger v. Harris*.

As was recognized by the majority opinion below, the New Jersey Supreme Court is not only the highest court in the State, but "is charged with the responsibility for the

39. *See also, Steffel v. Thompson*, 415 U.S. 452 (1974); *Mitchum v. Foster*, 407 U.S. 225, 230 (1972); *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972).

40. *Carey, Federal Court Intervention in State Criminal Proceedings*, 56 *Mass L. Quar.*, 11, 22 (1971); *Note, Protecting Civil Liberties Through Federal Court Intervention In State Criminal Matters*, 59 *Calif. L. Rev.* 1549, 1565-66 (1971).

overall performance of the judicial branch." *Helfant v. Kugler*, 500 F.2d 1188, 1193 (3d Cir. 1974), quoting from *In re Mattera*, 34 N.J. 259, 272, 168 A.2d 38, 45 (1961).

The court has the power to make rules governing the lower New Jersey Courts and to enforce them. *Id.* In fact, the New Jersey Constitution,[41] Statutory law,[42] and Rules of Court,[43] confer the broadest administrative power on the court over the bench and bar.

> "The intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority. *Lichter v. County of Monmouth*, 114 N.J. Super. 343, 349, 276 A.2d 382, 385-86 (App. Div. 1971).

The New Jersey Constitution provides that the Chief Justice of the Supreme Court is the "administrative head of all of the courts in the State." *Article* VI, §7, ¶1. This imbues the Chief Justice with the power to:

> ". . . assign judges of the Superior Court to the Divisions and parts of the Superior Court, and . . . from time to time transfer judges from one assignment to another . . ." *N.J. Const.*, Art. VI, §7, ¶2.

It is clear that the New Jersey Supreme Court is much more than an appellate court. It is the overseer of the bench and bar in the State and is vested with formidable supervisory and administrative power over both.

It was this court that ordered the Administrative Director of the New Jersey Courts to telephone petitioner-Helfant on November 6, 1972 and inform him that he was to appear before the New Jersey Supreme Court, in private

41. *N.J. Const.*, Art. VI, §2, ¶1-3 (1947).
42. *N.J.S.A.* 2A:1B-2 through 9.
43. *N.J. Court Rules*, 1:20-1, *et seq.*

session, on November 8, 1972 at ten minutes before ten o'clock in the morning. Helfant was ordered to appear notwithstanding his admonition to the Director that he had been subpoenaed to appear before the State Grand Jury at 10:00 A.M. on the same date. In fact, the Administrative Director replied that he was well aware of that fact, but would not tell Helfant the reason for the meeting although asked to do so. It was this court that further instructed the Administrative Director to obtain a report from respondent, Joseph A. Hayden, Jr., the Deputy Attorney General that had been handling the Grand Jury matter involving Helfant, and which ordered him to deliver "all relevant grand jury testimony."[44] In fact, respondent-Hayden delivered this material to the court before Helfant entered the Chambers and was confronted by the court sitting in its robes.

The court then began to interrogate Helfant using the information contained in the raw grand jury minutes. The Chief Justice immediately inquired of him whether he thought a judge should invoke the Fifth Amendment. Justice Sullivan then asked what the petitioner's feelings were about a judge sitting in judgment of others while he himself was invoking the Fifth Amendment before a grand jury. Justice Sullivan also asked Helfant if he had sat as a judge since invoking the Fifth Amendment.

The Chief Justice then immediately resumed the questioning, asking Helfant about incidents that hed been brought before the State Grand Jury and had not yet been

44. The quoted material is taken directly from the respondent's petition for certiorari, No. 74-80, at page 13. This is a startling admission by the respondents that the New Jersey Supreme Court had ordered the Administrative Director to produce for it raw grand jury testimony, arising out of the case in which Helfant was a target of the Grand Jury and which, conceivably could be presented to the court on appeal. As the State further admits, "the material was obtained and it revealed in substance the allegations against Judge Helfant. . . ."

made public. The Chief Justice cut off discussion about the merits of the criminal matter when Helfant tried to explain why he had previously resorted to the Fifth Amendment. Finally, the Chief Justice directed a last question to Helfant, in a tone of voice that clearly indicated that the question was directly aimed at Helfant's imminent grand jury appearance, "What do you intend to do today?"

It is out of this factual context that Helfant has alleged violations of his Fifth, Sixth and Fourteenth Amendment rights. To adequately fathom the magnitude of these violations certain basic considerations should be examined regarding the Fourteenth Amendment due process and equal protection considerations. It was long ago settled that the prohibitions of the Fourteenth Amendment were directed to the States, and were, to a degree, restrictions upon small power. *Ex parte Virginia*, 100 U.S. 339, 346 (1880); *Hunter v. Wood*, 209 U.S. 205 (1908). The Amendment empowered Congress to enforce the provisions "against State action, however put forth, whether that action be executive, legislative or judicial."[45] Thus, no agency of the State, or officer or agent of the State could deny to any person within its jurisdiction those rights guaranteed by the Amendment.[46]

> ". . . legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it realized that State officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

The concept of due process of law, found in the Fourteenth Amendment did not originate in the American sys-

45. *Ex parte Virginia, supra,* 100 U.S. 346.
46. *Id.* at 347.

tem of Constitutional Law, but was contained in the Magna Charta, as a part of the ancient English liberties. *See generally,* 16 *Am. Jur.* 2d *Constitutional Law,* §543 (1964). Basically, due process "has to do . . . with the denial of that 'fundamental fairness, shocking to the universal sense of justice.' It deals with neither power nor jurisdiction but with their exercise." *Kinsella v. United States,* 361 U.S. 234, 246 (1960). The Due Process Clause restrains those arbitrary and unreasonable exertions of power by the States which are not really within the lawful State power, since they are so unreasonable and unjust as to impair and destroy fundamental rights. *American Land Co. v. Zeiss,* 219 U.S. 47 (1911).

While due process itself is an illusive concept, the exact boundaries of which are undefinable, *Hannah v. Larche,* 363 U.S. 420, 442 (1960), there can be no doubt that the concept of due process has evolved and expanded over the years. *E.g., Grannis v. Ordean,* 234 U.S. 385, 394 (1914); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Morrissey v. Brewer,* 408 U.S. 471 (1972). Perhaps the best statement regarding the relationship between the Due Process Clause and state criminal law is found in *Rochin v. California,* 342 U.S. 165, 168-69 (1952).

> Broadly speaking, crimes in the United States are what the laws of the individual states make them, subject to the limitations of Art. I, §10, cl. 1 in the original Constitution, prohibiting bills of attainder and *ex post facto* laws, and the Thirteenth and Fourteenth Amendments.
>
> These limitations, in the main, concern not restrictions upon the powers of the States to define crime . . . but restrictions upon the *manner* in which the States may *enforce* their penal codes. " • • • Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of

> judgment upon the whole course of the proceedings [resulting in the conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even for those charged with the most heinous offenses. • • • Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Commonwealth of Massachusetts,* 391 U.S. 97, 105 [1934] . . . or are 'implicit in the concept of ordered liberty.' *Palko v. State of Connecticut*, 302 U.S. 319, 325 [1937] . . . ."

As the Court went on to say:

> In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on the balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society. *Id.* at 172.

In the present case, Helfant, an attorney and municipal court judge, was called before the State Supreme Court. Was this procedure in conformance with due process? Or, in other words, was Helfant due any process if the Court wished to conduct a possible removal or disbarment proceeding? *See, Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The answer may be found in New Jersey's own Statutes and Court Rules.

Distinct statutory procedures and rules govern the exercise by the New Jersey Supreme Court of its power to remove judges or to discipline members of the bar. Under *N.J.S.A.* 2A:1B-3, a proceeding for the removal of a judge

may be instituted by either house of the legislature, the governor, by the filing of a complaint, or "by the Supreme Court on its own motion." Full due process rights and protections are afforded a judge during these proceedings. *See, N.J.S.A.* 2A:1B-3 through 10. And, the judge may be removed only if the Supreme Court "finds beyond a reasonable doubt that there is cause for removal. . . ." *N.J.S.A.* 2A:1B-9.

Similar protections are afforded to the lawyer facing disciplinary proceedings. *New Jersey Rules Governing the Courts,* 1:20-1 *et seq.* If a disciplinary committee receives a complaint, or is directed by the Supreme Court to investigate a member of the bar[47] it prepares a statement of charges.[48] A complaint is then issued and served,[49] and a preliminary investigation made.[50] The committee then either dismisses the complaint, or, if it finds unethical or unprofessional conduct, prepares a presentment which it files with the New Jersey Supreme Court.[51] That Court then determines whether it shall issue an order to show cause why the attorney should not be "disbarred or otherwise disciplined."[52] A hearing is held in the Supreme Court on the order. It is important to note that all records, files and meetings are confidential, *R.* 1.20-3(b), and all briefs, papers and exhibits submitted to the Supreme Court are impounded by the Clerk, *R.* 1:20-8. Indeed, in disciplinary proceedings, as in removal proceedings, full due process rights are afforded.[53]

47. *Rule* 1:20-2(b).
48. *Id.*
49. *R.* 1:20-4(b).
50. *R.* 1:20-4(c).
51. *R.* 1:20-4(h)
52. *R.* 1:20-4(i); *R.* 1:20-8.
53. The protections afforded by the Rules were recognized in *DeVita v. Sills,* 422 F.2d 1172 (3d Cir. 1970) and thus the United States Court of Appeals for the Third Circuit upheld these Rules.

An examination of the record herein indicates that the petitioner was never afforded any of these protective procedures. He was ordered by the Administrative Director of the New Jersey Courts to appear in Chambers *ten minutes* before a grand jury appearance. The Administrative Director called Helfant personally, notwithstanding his knowledge of Helfant's representation by counsel. Further, he did not tell Helfant any reasons for the meeting. The New Jersey Supreme Court requested and received from Deputy Attorney General Hayden the minutes of the grand jury and all matters currently in the file regarding the Helfant matter. Once inside Chambers, Helfant was questioned by the Chief Justice and other Justices about his intention regarding the Fifth Amendment ten minutes before his grand jury appearance. He was further questioned by the Chief Justice about matters being considered by the Grand Jury before which Helfant was to appear. Moreover, Helfant's co-defendant, Samuel Moore, was also called before the Supreme Court immediately after Helfant. He brought with him the complaint which constituted the State's *prima facie* exhibit against Helfant. The Chief Justice discussed the complaint and Helfant's signature and other matters then being presented before the grand jury.[54]

Thus, the record indicates that the New Jersey Supreme Court completely disregarded those very rules and statutes that were designed to protect the individual and insure procedural regularity and due process of law. *See, DeVita v. Sills,* 422 F.2d 1172 (3d Cir. 1970); *Cf., City of Lawrence v. Civil Aeronautics Bd.,* 343 F.2d 583 (1st Cir. 1965). Thus, it is partly upon these facts that Helfant's due process claim is made out. *See, United States v. Raines,*

54. Thus, the allegations by the State that the merits of the underlying controversy were not discussed are simply not true. The record does not support these allegations, but directly contradicts them. *See* Petition, No. 74-80 at 14-15.

362 U.S. 17 (1960); *Buchalter v. New York*, 319 U.S. 427 (1943).[55]

The respondents have argued that the procedure utilized by the New Jersey Supreme Court here was "recognized and established through state constitutional and statutory law,"[56] and that the Supreme Court's obligation to the bench, bar and public sometimes forced the Supreme Court to act prior to formal indictment.[57] The simple answer, of course, is that there is nothing in the record to support this bald assertion; in fact, this is the first time that this has been raised as a justification! Notwithstanding the State's characterization of the procedure utilized, "both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by a simple label a state chooses to fasten upon its conduct. . . ." *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). Moreover, even if this were the actual situation, there is nothing in the statutes or rules which allows the court to summarily interrogate a judge or lawyer prior to the institution of formal proceedings and especially ten minutes before a scheduled grand jury appearance. If anything, the due process clause was designed in particular to protect against this type of situation, to protect "the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22

55. In essence, this was an intentional action on the part of a state official to intentionally administer unequally a law fair on its face. This was an unconstitutional selection in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Snowden v. Hughes*, 321 U.S. 1 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356, 362-63 (1886). *See also, Note*, 59 *Calif. L. Rev., supra*, at 1556.

56. Petition, No. 74-80 at 40.

57. *Id.* at 33.

(1972). Moreover, even though the governmental purpose herein may have been legitimate and substantial it could not be pursued by means that stifled fundamental personal liberties. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). In essence there was not one word of testimony to support the respondents' assertions that the Supreme Court was engaged in any legitimate inquiry. The facts and the record simply belie it.

Moreover, the failure of the New Jersey Supreme Court to abide by established law and its own rules also deprived the petitioner of his right to counsel, mandated by both the New Jersey Court Rules, 1:20-1 *et seq.*, and the Sixth Amendment, *U.S. Const. Amend.* VI, *Cf., Coleman v. Alabama*, 399 U.S. 1 (1970); *Conley v. Dauer*, 463 F.2d 63 (3d Cir. 1972).

Thus, it is seen that the New Jersey Supreme Court was engaged in a constitutionally illegitimate procedure, one designed to force Helfant into foregoing his Fifth Amendment rights. In this context, the proper legal framework of the coercion issue takes shape. While there can be no doubt that lawful investigatory conduct may possess a "compelling atmosphere,"[58] or create a "Hobson's Choice,"[59] for an individual, unlawful or illegitimate conduct renders the product of that conduct illegal, incompetent and inadmissible. *Cf., Miranda v. Arizona*, 384 U.S. 436, 466 (1966). It is the procedure causing the compulsion which must be examined to determine if there has been a denial of due process of law. *Cf., Rochin v. California, supra.* In other words, if a defendant signed a sworn confession exacted from him in violation of *Miranda*, there could be no question that he could not be prosecuted for perjury, should the confession prove to be false.

58. *Miranda v. Arizona*, 384 U.S. 436, 466 (1966).
59. *Id.*

This argument gains more force when the rationale behind the Fifth Amendment is examined. It is clear today that the purpose of the Fifth Amendment is to deter illegal governmental action. *See, e.g., Michigan v. Tucker,* — U.S. —, 94 S. Ct. 2537 (1974); *Jackson v. Denno,* 378 U.S. 368 (1969); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Culombe v. Connecticut,* 367 U.S. 568 (1961). The product of illegal governmental action may indeed have great relevance to crucial issues of guilt or innocence, but this is not the focus of the inquiry. The focus is upon the governmental action. It is the prophylactic nature of the rule which serves to vindicate the due process rights. *See, Chaffin v. Stynchcombe,* — U.S. —, 93 S. Ct. 1977, 1982 (1973); *Colten v. Kentucky,* 407 U.S. 104 (1972); *Moon v. Maryland,* 398 U.S. 319 (1970); *North Carolina v. Pearce,* 395 U.S. 711 (1969).

Here, the Supreme Court illegally interrogated Helfant, summoning him to its Chambers when it had absolutely no right to do so, ten minutes before a grand jury appearance of which it knew. Anything exacted from him as a result of this confrontation was illegal, in violation of Helfant's due process rights. With this analysis in mind, there can be no doubt that Helfant has suffered, and continues to suffer, irreparable constitutional harm which is both great and immediate.[60]

Moreover, the magnitude of the due process violation increases if one examines the entire factual pattern alleged in the complaint. Prior to Helfant's testimony, three convicted felons, John Cantoni, Sheldon Kravitz and Abraham

60. The procedural due process violation was probably best articulated by Mr. Justice Jackson in his dissenting opinion in *Shaughnessy v. United States,* 346 U.S. 206, 224 (1953) (Jackson, J., dissenting):

> "Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. • • • Procedural fairness and regularity are of the indispensible essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."

Schusterman testified in the grand jury under a grant of immunity. They were all summoned there by respondent, Deputy Attorney General Hayden, and testified pursuant to promises of concessions and recommendations of leniency by the State. Thus, the testimony before the grand jury had been structured, or in other words, "set up," prior to November 8, 1972, the date of Helfant's second appearance. Previously, Helfant had resorted to the Fifth Amendment and had every intention to do so on this date. This fact was known to the Supreme Court, because the State has now admitted for the first time that the grand jury minutes were turned over to the court prior to Helfant's entrance into Chambers on November 8, 1972. Similarly, the court must have also known of the testimony of Cantoni, Kravitz and Schusterman. When Helfant was called into Chambers, he was immediately confronted with questions about his resort to the Fifth Amendment and was asked upon leaving by the Chief Justice, "What do you intend to do today?" Helfant, fearful and overwrought, conceiving that his livelihood was at stake, testified before a grand jury that had been structured to indict him for some offense if he testified.[61]

Helfant's case is factually quite similar to two cases arising in the lower Federal Courts, *United States v. Mandujano*, 496 F.2d 1050 (5th Cir. 1974) and *United States v. Rangel*, 496 F.2d 1059 (5th Cir. 1974). The analysis in those cases serves as a guide to the decision here. In *Mandujano*, the defendant had appeared before a grand jury investigating alleged narcotics violations. The United States Attorney had received a report from a narcotics agent

61. "Since *Chambers v. Florida*, 309 U.S. 227, . . . [the Supreme] Court has recognized that coercion can be mental as well as physical . . . ." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

"When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal." *Watts v. Indiana*, 338 U.S. 49, 53 (1949). The decision must be freely as well as rationally made. *Blackburn v. Alabama, supra*, 361 U.S. at 208.

that he had previously attempted to offer defendant money for the purchase of heroin. The United States Attorney had questioned the agent of the circumstances of this attempted buy in preparation for defendant's appearance before the grand jury. When defendant appeared to testify, the agent had preceded him, detailing the circumstances of the attempted buy. The government attorney questioned the defendant, tracking the exact facts of his actual contact with the Federal narcotics agent. The defendant was subsequently indicted for perjury, the perjury based upon the defendant's denial before the grand jury of any attempt to obtain or sell heroin or any solicitation to do so.

The defendant then moved to suppress his testimony before the grand jury. The district court granted the motion expressing itself in words quite appropriate to the present case:

> Considering the totality of the circumstances in this case, the questioning of the defendants before the grand jury smacks of entrapment • • • If the defendants admitted that they had offer [*sic*] to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. • • • The denial of the defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. *Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them. United States v. Mandujano*, 365 F. Supp. 155 158-59 (W.D. Tex. 1973) (emphasis added).

The United States Court of Appeals for the Fifth Circuit affirmed.[62] It first recognized that there was no basis for the perjury indictment prior to the defendant's testi-

62. *United States v. Mandujano*, 496 F.2d 1050, 1059 (5th Cir. 1974).

mony. If the government attorney actually anticipated the answers, the court found, he must have known that the responses would require the defendant to either confess to a crime or commit perjury. The inference was that the questioning was primarily aimed at baiting the defendant to commit perjury; thus, the only "safe harbor" for the defendant was to keep silent, a right of which the government failed to adequately inform him. Although the court recognized that *Glickstein v. United States*, 222 U.S. 139 (1952) and other cases held that the Fifth Amendment did not allow a person to commit perjury, it distinguished these cases on several important factors. First, *Glickstein* involved no governmental misconduct.[63] As the court had earlier said, "we simply cannot ignore the unfairness in baiting this defendant before the grand jury. . . ."[64] The court simply could not "overlook the principle that the Fifth Amendment must always be as broad as the mischief against which it stands."[65] Thus, as a deterrent to any future prosecutorial misconduct the court ordered suppression of the testimony.

More importantly, the court held that the:

> Entire proceedings here which led up to Mandujano's indictment for perjury were, as we have noted repeatedly, beyond the *pale of permissable prosecutorial conduct*. We conclude that the entire proceeding was a violation of Mandujano's due process rights . . . (emphasis in original).[66]

As the court concluded, an asserted denial of due process is tested by the totality of the facts of the given case. Here, the conduct was so "offensive to the common

63. *Id.* at 1058.
64. *Id.* at 1056.
65. *Ibid.*
66. *Id.* at 1058.

and fundamental ideas of fairness" as to amount to a violation of due process. It thus affirmed.[67]

United States v. Rangel, supra, was a companion case of *Mandujano.* Here, defendant was also called before the grand jury, pursuant to a subpoena. He was told by the Assistant United States Attorney conducting the grand jury investigation that anytime he felt an answer would be incriminating, he did not have to answer. However, he was warned that he could not refuse to answer a question if the answer would not tend to incriminate him. "In other words you would be in contempt of court."[68] The Court of Appeals found these proceedings even more unfair than those in *Mandujano* because, "not only are all the ingredients of Mandujano's predicament present, but also the warning actually given Rangel contained an implicit threat which all but negated the warning of the privileges against self-incrimination."[69] The court thus concluded that the procedure employed by the government to indict Rangel was a violation of due process.

The present case involving Helfant is far stronger. The testimony against him did not come from a Federal narcotics agent, but from three convicts, then in jail, who were granted immunity for their testimony and promises of recommendations of leniency (which have been carried out). Secondly, the conduct was not limited, as it was in *Mandujano* and *Rangel,* to a prosecutor calling in a pro-

67. See n.62 *supra.* The law of the State of New Jersey is the same. *State v. Redinger,* 64 N.J. 41 (1973). In this case the defendant was sworn and testified to a traffic offense when it was known to the municipal court judge that the police had obtained a sworn statement from two individuals directly contradicting defendant's testimony. Defendant was indicted for perjury and moved to dismiss the indictments. On appeal, the New Jersey Supreme Court held that "fundamental fairness" barred the State from charging the defendant with perjury. As the court said, ". . . the State should have no part in any kind of trickery. What happened at the hearing . . . smacks of entrapment. • • • This was not fair play." 64 N.J. at 50.

68. 496 F.2d at 1060.

69. *Id.* at 1062.

spective defendant, knowing that he had been involved in wrongdoing and would not be in a position to admit it before a grand jury. Here, it was the combined action of judicial lawlessness and prosecutorial misconduct which coerced and frightened the petitioner out of the exercise of his Fifth Amendment rights. While both *Mandujano* and *Rangel* had the ability to seek redress in the courts, and actually did so, where was petitioner to go? As in *Mandujano* and *Rangel*, the proceedings smacked of an attempt to entrap the defendant to either incriminate himself or commit perjury. The proceedings in *Mandujano* and *Rangel* were found to be violative of due process. Certainly, nothing can be more shocking to common notions of fairness than judicial-executive collusion. There can be no doubt that Helfant has suffered, and continues to suffer, a massive violation of his due process rights.[70]

Because Helfant has only been indicted and not convicted of any crime, and because the Fifth Amendment coercion issue arises in a due process context, his situation must be set apart from those cases earlier cited by the respondents for the proposition that the Fifth Amendment does not protect against perjury. *E.g., United States v. Knox*, 396 U.S. 77 (1969); *Bryson v. United States*, 396 U.S. 64 (1969); *United States v. Kahringer*, 345 U.S. 22 (1952). In each of these cases, the defendant had been

70. Thus, under this analysis, the respondents cannot legally or analytically distinguish, under *Mandujano*, the false swearing counts of the State indictment from the substantive counts. The due process violation permeates both. More important, this case comes to the Court, not after a conviction for false swearing, but only after an indictment. No one has proved Helfant lied, and in fact, the inference can be just as strong that the three convicts lied. There was certainly a motivation to do so. An indictment is only an accusation, it does not reflect on guilt or innocence.

Moreover, part of the harm is in the fact Helfant testified. Perhaps it was his testimony that proved the deciding factor in the minds of a number of grand jurors that caused them to vote for an indictment on all the counts. Intangibles are certainly involved, not merely legal analysis. It is not beyond conjecture to say that had Helfant not testified, the grand jurors might have disbelieved the entire testimony of the three convicted felons.

convicted beyond a reasonable doubt for perjury and sought to overturn the conviction on the ground that the government had illegally exacted the incriminating statement. Moreover, in each case, at the time the alleged perjury was committed, the government had a lawful right to exact the information it sought. It was neither engaging in judicial lawlessness, prosecutorial misconduct, nor entrapment. In other words, elemental due process violations were not implicated in the proceedings leading up to the incrimination.

In the present case, Helfant was actually "set up" by the collusion between Deputy Attorney General Hayden and the New Jersey Supreme Court. The three convicts had already testified. Thus, if Helfant did testify, he could either agree with them, implicating himself in an alleged criminal scheme, or disagree, setting himself up for the false swearing charges. His intention was to take the Fifth Amendment, thus avoiding any testimony whatsoever. The Supreme Court, however, brought Helfant into Chambers ten minutes before his appearance and coerced him into testifying, removing the only "safe harbor" open to him, *i.e.*, to remain silent. This misconduct plainly distinguishes the Helfant situation from those in the above cited cases. It is the type of conduct that the Fifth Amendment was designed to deter.

More on point are those decisions such as *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Raines v. United States*, 390 U.S. 85 (1968) in which the method by which the defendants were caused to incriminate themselves was legally challenged. Here, Helfant seeks to lawfully challenge the method by which the statements were exacted, prior to any determination of his guilt of any substantive charge.

It must also be remembered that involved in the factual complex is the divulgence of raw grand jury data by Deputy Attorney General Hayden and his collusion with the court. This was in direct violation of the New Jersey Rules mandating secrecy for grand jury proceedings, *R.* 3:6-7, 3:6-8, and of numerous cases. *See, e.g., State v. Clement*, 40 N.J. 139 (1963); *United States v. McKeaver*, 271 F.2d 669 (2d Cir. 1959). While a grand jury is an arm of the court, *In re Jeck*, 26 N.J. Super. 514, 98 A.2d 319 (App. Div. 1953), it is not a tool of either prosecutor or judge. The Rules provide for the secrecy of the grand jury testimony; no Rule provides for its divulgence to the Supreme Court during an ongoing investigation. Such divulgence would be an unlawful use of the grand jury to violate a defendant's constitutional rights. *See, Branzburg v. Hayes*, 408 U.S. 664 (1972); *United States v. Bryan*, 339 U.S. 323 (1950); *Blackmer v. United States*, 284 U.S. 421 (1932).[71]

The action of the Deputy Attorney General was plainly misconduct. In New Jersey, misconduct by the prosecutor or the grand jury itself is grounds for dismissal of the indictment. *State v. Grundy*, 136 N.J.L. 96 (Sup. Ct. 1947); *State v. Garrison*, 130 N.J.L. 350 (Sup. Ct. 1943); *State v. Borg*, 9 N.J. Misc. 59 A. 788 (Sup. Ct. 1931); *State v. Donovan*, 129 N.J.L. 470 (1943); *State v. Dayton*, 23 N.J.L. 49 (Sup. Ct. 1850). The Deputy Attorney General, upon being requested to divulge the grand jury minutes should have immediately refused. He had an absolute duty to do so.

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71. To accept respondents' position that because a grand jury is an arm of the court, the court is thus allowed to examine raw grand jury matters, is like saying the court may take money *in custodia legis* and use it to go on vacation. Or, it is like saying that because the petit jury is an arm of the court, the court may sit in on its deliberations!

Furthermore, this action by the Deputy Attorney General under the cases, was in itself a violation of Helfant's due process rights. In *Chessman v. Teets,* 350 U.S. 3 (1955), the defendant applied to the Federal District Court for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court had been heard upon a fraudulently prepared transcript of the trial proceedings. He alleged that the prosecuting attorney and the court reporter had, by corrupt agreement, prepared the fraudulent transcript. On the record before the United States Supreme Court there was no denial of petitioner's allegations. Therefore, it was held that the charges of fraud, as such, set forth a denial of due process of law in violation of the Fourteenth Amendment. In *Mooney v. Holohan,* 294 U.S. 103, 112-13 (1925), the petitioner charged a violation of due process in the knowing use by the prosecution of perjured testimony and the deliberate suppression by the prosecution of evidence which would have impeached or refuted the testimony. The State argued that this did not raise a Federal question. In answer, the Court said:

> "That requirement [of due process], in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. • • • It is a requirement that cannot be deemed to be satisfied . . . if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with

> the rudimentary demands of justice as is the obtaining of a like result by intimidation."[72]

It is seen then that the due process violation came from two fronts, the Supreme Court and the Deputy Attorney General. Each action separately was a violation of due process; collectively they represented a massive violation of petitioner's constitutional rights. Moreover, there was not only a violation of Helfant's due process rights, but also a violation of the doctrine of separation of powers embodied in the Federal and New Jersey Constitutions. *N.J. Const. Art.* III, §1 (1947).

An examination of the complaint thus reveals much more than an allegation of coercion. It reveals a violation of the petitioner's Sixth Amendment right to counsel and massive violations of his due process rights under the Fourteenth Amendment. Moreover, it alleges constitutional harm that has already taken place, not that merely threatened. The structure of the New Jersey court system, in imbuing the Chief Justice and Supreme Court with tremendous power over bench and bar, supports the allegation of the possibility that the "brooding omnipresence" of the New Jersey Supreme Court could affect a trial judge seeking to make a determination of the voluntariness issue. *See, Helfant v. Kugler, supra,* 500 F.2d at 1197.[73]

Furthermore, if Helfant lost the voluntariness issue in the trial court, his ultimate appeal would necessarily have to be to the very court alleged to have collusively

72. *Cf., Brady v. Maryland,* 373 U.S. 83 (1963).

73. As the Third Circuit opinion recognized, this factual determination would have to be made by a State Judge, "subject to the 'absolute and unqualified' administrative power of the Supreme Court, with a possibility of ultimate review by the New Jersey Supreme Court itself." *Id.* at 1194. On the basis of the record in this case, it is respectfully submitted that it cannot be said that the opinion below erred in its determination that "extraordinary circumstances" existed.

engaged in the coercion. As both the *en banc* decision, *Helfant v. Kugler, supra,* 500 F.2d at 1193, and the decision of the three-judge court recognized, the predicate of *Younger v. Harris* was an assumption that the defense of the pending State prosecution would afford an adequate remedy at law for the vindication of the Federal constitutional rights at issue. As they further recognized, exceptional circumstances "must include circumstances reflecting upon the likelihood that the State forum will afford an adequate remedy at law . . . ." *Ibid.* As was said in *Fenner v. Boykin*, 271 U.S. 240, 244 (1926), "The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that course would not afford full protection."[74] And, it has been established beyond doubt that an adequate remedy at law includes the ability not only to have a proper trial in the state trial court, but also the ability to resort to full state appellate processes. *Douglas v. City of Jeannette,* 319 U.S. 157, 164 (1943).[75] Obviously, any resort to the New Jersey court system, as a matter of law, would not afford "full protection." Thus, if the circumstances here alleged do not fall within the category of extraordinary circumstances, none do.

Based upon the present record there are ample facts to justify, at the least, federal intervention for the purposes of fact-finding. *See, Conover v. Montemuro,* 477 F.2d 1073 (3d Cir. 1973). It is respectfully submitted, how-

74. The New Jersey Courts have rejected all of petitioner's efforts to quash the indictment on the grounds that it was based on coerced testimony. Plainly, the state courts have not afforded him a remedy at law. Moreover, Helfant sought state relief up to and including that of the New Jersey Supreme Court. That court denied his application in an order over the signature of the respondent, Chief Justice (App. 42-59).

75. As one commentator has noted federal court intervention is warranted when the "federal court is able to provide a form of relief necessary to protect the petitioner's rights that a state criminal court is legally powerless to grant." *Note,* 59 *Calif. L. Rev. supra,* at 1552.

ever, that the opinion below did not go far enough. As has been demonstrated, the massive violations of due process, the extraordinary circumstances under which this case arises, call for massive Federal intervention. It must be greatly questioned whether a Federal adjudication on the collusion issue would be enough to cleanse the state processes of the taint that has been spread upon them by the actions of the New Jersey Supreme Court and the Deputy Attorney General. Every state official is bound by the Fourteenth Amendment. *United States v. Raines*, 362 U.S. 17 (1960). And due process protects against any arbitrary action of any state tribunal. *Washington ex rel. Oregon, R.R. and Nav. Co. v. Fairchild*, 244 U.S. 512 (1911). Every tribunal must be fair and impartial and without any interest in the procedure. *Toomey v. Ohio*, 273 U.S. 510 (1927). For, as was said *In re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the possibility of unfairness.

This is exactly what is involved in the present case. The New Jersey Supreme Court exerts great powers. It has injected itself into a prosecution. Can it be said that petitioner can ever vindicate his rights in the courts of this state?

Lastly, it must be emphasized that this is a civil rights case brought under 42 U.S.C. §1983 (1970). Under this section, it is not necessary to show an improper motive on the part of the defendants, *Bennett v. Gravelle*, 320 F. Supp. 203 (D. Md. 1971). Neither is it necessary to show that the wrongful acts complained of were done with a

specific intent to deprive petitioner of a federally protected right, *Baxter v. Birkins,* 314 F. Supp. 222 (D. Colo. 1970). Nor, is it necessary to allege a specific intent to deprive petitioner of a federally protected right in the complaint itself. *Penn v. Stumpf,* 308 F. Supp. 1238 (N.D. Ca. 1970). Consequently, the question in this case is not whether the respondents actually intended to deprive Helfant of his federal rights, but rather whether, in fact, their actions led to this deprivation.

Respondents have argued that petitioner had already suffered the harm. They further argue that a number of the Justices have left the court and thus Helfant would not be facing those very individuals whom he alleged engaged in the coercion. Thus, they conclude that he has no standing to complain of the conduct. This analysis is both factually incorrect and constitutionally deficient.

First, while it is true that certain Justices have retired, it is also true that others have not and currently sit on the court. Secondly, as a matter of law, the argument ignores basic precepts of constitutional analysis. To accept it would be akin to saying that because the unconstitutional search has already taken place, and the particular officers involved have retired, the defendant could not seek to challenge the eidence on Fourth Amendment grounds! As was said in *United States v. Calandra,* — U.S. —, 94 S. Ct. 613, 619 (1974) the prime purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment . . . ."

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[76]

76. Quoting from *Elkins v. United States,* 364 U.S. 206, 217 (1960).

It is of no moment that the injury has already taken place because, "the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."[77] It is the deterrent effect which is hoped will guarantee the future rights of others through the exercise of the remedy in the particular case.

Furthermore, mootness of an issue, for injunction purposes, does not arise merely because the complained-of activity has ceased. There is no requirement that the victim be continually subjected to unlawful restrictions upon his liberty throughout the pendency of an action in order to preserve it as a live controversy.[78] If there is the mere possibility of recurrence, the action remains live, especially in the constitutional sense, since the mere possibility might be enough to create a present and future chilling effect on the exercise of constitutional rights.[79] More importantly, when there is constitutional harm involved, it may be virtually impossible to determine if there was actual harm, or lack of harm. *Cf., Peters v. Kiff*, 407 U.S. 501, 504 (1972). In light of any uncertainty, any doubt should be resolved in favor of the victim, since the unconstitutional action may "cast doubt on the integrity of the whole judicial process."[80] The resolution in favor of the victim thus serves to cleanse the entire system.

Helfant, a lawyer, was subjected to close questioning, on matters directly related to his prior and imminent resort to the Fifth Amendment, by Justices of the highest court in his state. What can have a more coercive effect upon a lawyer than to be subjected to an interrogation by judges, at a time and place foreign from the normal process of the court? It would not be rife to say that veiled

77. *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).
78. *Allee v. Medrano, supra*, — U.S. —, 94 S. Ct. at 2197.
79. See, *SEC v. Medical Commission of Human Rights*, 404 U.S. 403, 406 (1972); *Gray v. Sanders*, 372 U.S. 368, 376 (1963).
80. *Id.* at 502.

threats inhere in such a situation. In the present situation the court had requested and received the raw grand jury minutes that indicated that petitioner had earlier resorted to the Fifth Amendment. *See, Spevack v. Klein*, 385 U.S. 511 (1967). Yet, this Chief Justice had disapproved of *Spevack*. *See, State v. Falco*, 60 N.J. 570, 292 A.2d 93 (1972). The known absolute power of this court over both the bench and bar could only nourish in Helfant a belief that a direct threat to his livelihood existed if he chose to again resort to the Fifth Amendment.

This Court has never hesitated to enjoin state officials from engaging in repressive conduct. It has hesitated to do so, however, when it believed that the State court system could protect the individual. At least, he had a vehicle available to vindicate his rights. But where is he to go when the state judiciary itself is implicated? Thus, conduct which may be considered mild if done by a state sheriff, or even a state prosecutor, becomes heinous if engaged in by the state judiciary. Where is the victim to turn, if not to the federal system? And, what should be the response, if not the most forceful and effective vehicle available for vindicating the rights of the victim and cleansing the system itself. That is what is necessary here, in these most extraordinary circumstances.

Point III

Bad faith on the part of respondents has been demonstrated by their patently unconstitutional conduct.

It has never been conceded, nor is it now conceded, that bad faith was never present in petitioner's State

prosecution.[81] In fact, petitioner alleged bad faith in his complaint:

> The conclusion must be that the State is engaged in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.S.C.A. §2283.

The court below found that this was not a case of bad faith and thus rejected petitioner's assertion that he was entitled to a federal injunction. *Helfant v. Kugler*, 500 F.2d 1188, 1196 (3d Cir. 1974). This was found notwithstanding the limited record made in the district court and the District Judge's failure to make fact-findings on the issue. It is submitted that the court erred in foreclosing the ability of the district court on remand to explore this issue.[82]

Perez v. Ledesma, 401 U.S. 82, 85 (1971) defined "bad faith" in the *Younger* context as a prosecution brought or threatened with no reasonable hope or expectation of obtaining a valid conviction. Numerous cases, both before and after *Younger*, have shown that the definition found in *Perez* was by no means the last word on what could constitute bad faith on the *part of state officials* which would support federal injunctive intervention in a pending state prosecution.

NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966), was a pre-*Younger* case in which mass arrests had occurred, movement leaders had been detained in temporary

81. The statement in the dissent in the court below, "that neither bad faith nor harassment are present in Helfant's prosecution" is wrong. *Helfant v. Kugler*, 500 F.2d 1188, 1199 (1974) (Adams, J., dissenting).

82. Although, as was argued above, since this is a case of "extraordinary circumstances" a showing of bad faith is not absolutely necessary to prove irreparable injury for purposes of federal injunctive relief.

jail facilities until each could make an individual bond, and the prosecution had insisted in trying each case separately. Granting affirmative relief, the court found:

> The record discloses a pattern of conduct on the part of the officials of the city . . . that leads us to the conclusion that defendants took advantage of every opportunity, serious or trivial, to break up these demonstrations in protest against racial discrimination, and that a large number of the arrests had no other motive, and some had no justification whatever, either under municipal, State or Federal law. *Id.* at 838.

Similarly, in *Houser v. Hill*, 278 F. Supp. 920 (M.D. Ala. 1968), the court enjoined police officials from from inflicting summary punishment against blacks and arresting them because of the exercise of their constitutional rights. *See also, Wheeler v. Goodman*, 298 F. Supp. 935 (W.D.N.C. 1969), *vacated*, 401 U.S. 987 (1971). In *Dombrowski v. Pfister*, 380 U.S. 479 (1965) the court found raids and seizures of materials, lack of probable cause for arrests, public exposure of files illegally seized, and threatened prosecutions.

In all these cases there were *acts* by government officers, other than the bringing of the prosecution itself, that indicted an invidious motive on the part of the officials. Further, the circumstances of each case suggested that as a result of these acts there was a direct chilling effect upon the exercise of constitutional rights as well as the direct violation of those rights by the government officials, *i.e.*, a real and not hypothetical deprivation of constitutional rights. *See, R. Sedler, Dombrowski In the Wake of Younger: The View From Without and Within*, 1972 *Wisc. L. Rev.* 1, 24-25 (1972). What must also be remembered, is that these cases showed, in addi-

tion to illegal arrests and detentions, illegal acts by government officials done *after* the arrests, *i.e.*, the illegal conduct of the officials in the *manner* in which the criminal laws were being enforced. *Cf., Rochin v. California,* 342 U.S. 165, 168 (1952).

Thus, these cases showed that bad faith was not premised upon a showing by the federal suitor of actual subjective intention of an invidious motive by the state officials,[83] but rather a showing of official action from which an inference of bad faith could be presumed.[84] In both *Taylor v. City of Selma,* 327 F. Supp. 1191 (S.D. Ala. 1971) and *Duncan v. Perez,* 445 F.2d 557 (5th Cir. 1971), *aff'g* 321 F. Supp. 181 (E.D. La. 1970), post-*Younger* cases, facts independent of the actual arrests were relied upon by the court to establish bad faith. In *Shaw v. Garrison,* 467 F.2d 113 (5th Cir. 1972), a post-*Younger* case, the court enjoined a single state prosecution holding that an injunction could lie against state prosecutorial authorities if they either fostered or took part in any misconduct. Significantly, the court equated bad faith with the actions of the prosecutorial authorities in a single state prosecution saying:

> When the federal right sought to be protected is the right not to be subjected to a bad faith prosecution . . . the right cannot be vindicated by undergoing the prosecution. *Id.* at 122, n.11.

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83. *Cameron v. Johnson,* 390 U.S. 611 (1968) indicates it would be very difficult indeed to make out a case simply by trying to show improper motive on the part of government officials. *See, Sedler, supra,* at 29. Common practice has always demonstrated that intention is one of the most difficult facts to prove in any case.

84. For example, proof of selective enforcement of a statute could suffice to establish bad faith since selective enforcement of a valid law is patently unconstitutional. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Selective enforcement would certainly be relevant on the issue of the bad faith of the authorities conducting the prosecution. *See, Sedler, supra,* at 30.

Shaw demonstrates that bad faith may be shown if state officials either fostered a bad faith prosecution, or then engaged in actions during the pendancy of the prosecution which indicated it had been undertaken in bad faith.

The United States Court of Appeals for the Third Circuit earlier had impliedly accepted this principle in *Lewis v. Kugler*, 446 F.2d 1343 (3d Cir. 1971). Here, plaintiffs sought to enjoin the alleged arbitrary and unreasonable searches of their vehicles by the New Jersey State Police. They claimed that they, and their class, were being singled-out for special treatment because of their long hair. The Court of Appeals affirmed the dismissal of the complaint by the district court, finding that this was the type of case in which plaintiffs' rights would be protected in a defense in state court. The court went on to make the following pertinent statement, however:

> The plaintiffs allege police misconduct, but an injunction against pending state criminal proceedings would operate against the prosecutorial authorities, and there was no allegation that they have either fostered or taken part in any alleged misconduct. *Id.* at 1348.

In other words, if there had been a collusive scheme between the police and prosecutorial authorities to actually single-out plaintiffs the injunction would have properly issued.[85] In *United States ex rel. Birnbaum v. Dolan*, 452 F.2d 1078 (3d Cir. 1971) the Third Circuit again implied that bad faith could be implied from the manner in which a prosecution was conducted, rather than in the reasons for bringing it.

Thus, the basic point is that *Younger v. Harris*, and *Perez v. Ledesma*, did not radically change—if they changed

85. This would have shown knowing selective enforcement of valid statutes. See, n.84, *supra*.

at all—the definition of bad faith. They merely sought to illustrate. As the cases both preceding and following them indicate, they were not the last word on bad faith.[86]

The bad faith in both the inception and handling of petitioner's prosecution is readily demonstrated. It commenced with the imperious command of the Supreme Court for Helfant to appear before it ten minutes before he was to go before the grand jury. It was continued by the structuring and manipulating of the grand jury proceedings by respondent Hayden, in bringing in three convicted felons, and, with promises of leniency, structuring their testimony in such a manner to set up Helfant for an indictment. The bad faith was nourished by Hayden and the court in its requesting raw grand jury minutes and his forwarding of them to the court, in violation of law. It was further nourished by the questioning of Helfant without his counsel present, by the Chief Justice and Justice Sullivan about matters pending before the grand jury, for the purpose of coercing Helfant to forego those Fifth Amendment rights he had so forcefully asserted, through counsel, at his initial appearance before the grand jury. Could the inference of bad faith have been better demonstrated than by the last question that the Chief Justice directed at Helfant, "What do you intend to do today?"

Finally, the factual context was completed when the court questioned Samuel Moore, Helfant's co-defendant, immediately after Helfant left the chambers, using the State's main exhibit as the source for the questions. This by the very court that would ultimately have to consider any appellate claims!

The court below erroneously chose to find no bad faith. It made this finding upon a limited record, when

86. *See, Note*, 59 *Calif L. Rev., supra*, at 1556-57. As Carey has noted, "What conduct falls within this category [of bad faith] remains to be worked out in future cases." Carey, *supra* at 20.

the district court made no fact-findings on the issue. This was a crucial finding because it served as a basis for disqualifying Helfant's claim for injunctive relief. At least, the court should have remanded to the district court for findings on the issue. *Cf., Allee v. Medrano*, — U.S. —, 94 S. Ct. 2191, 2202 (1974). Petitioner asserts that this Court should overturn this finding and allow the full exploration of the issue of bad faith.

Point IV

The present matter should be remanded to the District Court for a full trial and complete findings of fact and conclusions of law.

As has been stated numerous times in this brief, this case comes before this Court after a *R.* 12(b)(6) motion and upon a very limited record. The only testimony taken was that on the return day of petitioner's order to show cause. The witnesses testifying were petitioner-Helfant himself and one of his attorneys, Patrick T. McGahn, Jr. Their testimony was supportive of the allegations in the complaint and established, without contradiction, the facts and circumstances surrounding Helfant's confrontation with the New Jersey Supreme Court on November 8, 1972. Respondents introduced no testimony or any exhibits to refute the material allegations of the complaint and petitioner's testimony.

Furthermore, the court below made no detailed fact-finding on any crucial issue in the case; it could not do so because of the limited nature of the testimony before it. Without binding the matter over for a full trial, it granted respondents' motion to dismiss the complaint for failure to state a claim upon which relief could be granted, with-

out determining in detail whether the prerequisites of *Younger v. Harris* had been met after a full trial. Further, the court made no findings of fact and quite conclusory findings of law on the return day of an order to show cause why a preliminary injunction should not issue. *See, Federal Rules of Civil Procedure*, 65(b). In many respects, the actions of the district court were not in conformance with the established law and practice in the area of preliminary injunctions.

First, the court dismissed petitioner's complaint at the conclusion of the hearing on the preliminary injunction only. The only testimony induced at this hearing was that of petitioner and one of his attorneys. Respondents made no attempt by way of testimony to contravert the material allegations of the complaint or to dispute the facts elicited through the testimony of petitioner and his witness. Counter-affidavits were not introduced. Thus, the proofs indicated that petitioner had been unlawfully called to the Chambers of the New Jersey Supreme Court, unlawfully interrogated by the Supreme Court, and as a result was coerced into foregoing his Fifth Amendment rights. The district court dismissed the complaint at the end of his testimony without ever notifying counsel that the court was consolidating the trial on the merits with the hearing on the restraining order. In *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971) it was held that if a complaint clearly stated a claim which entitled the plaintiff to some injunctive relief if proved at trial, and the evidence presented was received solely upon plaintiff's application for a preliminary restraint, without the consolidation of this hearing with the trial on the merits, the court erred in denying injunctive relief and in dismissing the complaint insofar as it sought permanent injunctive relief against a violation of plaintiffs' Eighth Amendment rights.

The facts of the present case are similar. Here, petitioner made out a clear civil rights violation in his complaint. He introduced testimony in support of the complaint which was not refuted by respondents. The court had absolutely no basis upon which it could dismiss the entire complaint without dealing with the crucial *Younger v. Harris* issues. It could properly deal with them only after a full trial. *Cf., K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087 (9th Cir. 1972). In *Santiago v. Corporacion de Renovacion Urbane Y. Vivienda de Puerto Rico*, 453 F.2d 795 (3d Cir. 1972) the court held that the dismissal of a civil rights complaint on the basis of findings made upon evidence which was introduced solely in support of an application for a temporary restraining order was error, when it could not be found that notice or warning was given by the court at any time before the decision that it was consolidating the trial upon the merits with the hearing on the restraining order; when the complaint did not fail to state a cause of action; and disputed material factual issues were presented which would preclude summary judgment. That in essence is what happened in the present case.

The district court herein made no fact-finding on the crucial issue of coercion. *See, Helfant v. Kugler*, 500 F.2d 1188 1192 (3d Cir. 1974). *Cf., Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *Haynes v. Washington*, 373 U.S. 503, 514 (1963). Neither did the District Court make any fact-findings on the ability of Helfant to vindicate his federal constitutional rights in the court system of New Jersey. It made no fact-findings on "extraordinary conditions," nor on the bad faith of the respondents, notwithstanding a situation in which the inference of bad faith, at least, would arise.

Moreover, the court made no detailed findings of fact on whether petitioner established irreparable harm

through the lack of an adequate remedy at law in the New Jersey court system. This, of course, would be dependent upon a detailed set of facts before the court, which were absent at that time.

A reviewing court cannot even consider the merits of an application for restraints, on appeal, without formal findings of fact and conclusions of law. *Central Gulf S.S. Corp. v. Int'l Paper Co.*, 477 F.2d 907 (5th Cir. 1973). The present case involves crucial questions of law, which need to be necessarily based upon detailed factual findings. Therefore, in the least, this matter should be remanded to the Federal District Court for a factual and legal exploration of "extraordinary circumstances," irreparable injury, bad faith—if necessary—and due process. There would be no prejudice to any of the parties herein if the hearing in the district court encompassed these issues.

Point V

Policy considerations militate in favor of federal interference in state criminal proceedings in the present case.

As was recognized in *Younger v. Harris*, comity is a concept embodying a respect of the federal government for the "legitimate activities of the state.[87] Comity, however, recognizes the need for the National Government to protect federal rights. It is a recognition that the federal courts are the primary repository for the protection of federal rights.[88] Thus, comity is not "blind deference to 'states' rights,'" but rather a signal to the federal government that its efforts to protect federal rights must always

87. 401 U.S. at 44.
88. *Ex parte Virginia*, 100 U.S. 339, 346 (1880).

be done in ways that will not "unduly interfere" with legitimate state functions.[89]

A state, of course, has a legitimate interest in administering its criminal justice system. Any undue interference with its legitimate administration would offend notions of comity. Our federal courts, however, have never hesitated to step in to vindicate important federal rights if those rights were being violated by state officials. *E.g.*, *Allee v. Mandrano*, — U.S. —, 94 S. Ct. 2191 (1974); *Dombrowski v. Pfister*, 380 U.S. 481 (1965); *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972); *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972); *NAACP v. Thompson*, 357 F.2d 831 (5th Cir. 1966).

When a state Supreme Court engages in activities patently violative of due process, then colludes with a Deputy Attorney General to coerce an individual out of the assertion of other constitutional rights, federal intervention is not only indicated, but absolutely mandated. For, in this situation, to whom is the individual to turn to vindicate his constitutional rights within the state? He can no longer turn to the judiciary because it is involved in illegal conduct. He is being besieged by those very authorities to whom he would primarily turn for protection. His only remaining avenue available for the protection of his constitutional rights is the federal courts. Federal court interference would thus not be "unduly interfering" with any "legitimate" state activity. Indeed, for the federal court to abstain in that situation would not only be that "blind deference" even the *Younger* opinion found impermissible, but would be committing the victim to summary punishment at the hands of his executioners.

The situation herein represents an illegitimate exercise of state power. This is not a case where there was a

89. *Younger v. Harris, supra*, 401 U.S. at 44.

good-faith attempt to enforce what might be an invalid statute. Here, there was a conspiracy between separate branches of government directed to the subversion of petitioner's constitutional rights. Surely, tension could arise by federal interference of state officials in a good faith attempt to enforce their criminal law. In the present situation, however, there can be no tension since it can in no way be said that legitimate state processes were being thwarted.

Here, the allegation has been made that the highest court of the State of New Jersey was engaged in an effort to violate the civil and constitutional rights of petitioner. Here it is alleged that there was a wholesale failure by the state judiciary and the executive to abide by notions of due process and other constitutional strictures. More importantly, petitioner's allegations have remained unrefuted; in fact, they have been admitted in an attempt to ameliorate their severity.[90] Under these conditions could the intervention mandated by the court below detract from the integrity of the state process, or rather, would it reestablish respect for proper state functions?

The court below concluded that federal intervention herein would serve to straighten notions of comity and respect.[91] Under the unusual factual complex presented herein could it be said that this conclusion was wrong? As the court below recognized, "judges in a free society regard even the appearance of a biased decision as more harmful than a result they personally disapprove."[92] This

90. Respondents have admitted that the New Jersey Supreme Court directed the Administrative Director of the New Jersey Courts to obtain the raw grand jury testimony and exhibits in the Helfant matter, while that matter was still being presented and even prior to the indictment of Helfant.

91. *Helfant v. Kugler, supra,* 500 F.2d at 1196-98.

92. *Id.* at 1197. The court quoted from Lord Herschell's remark to Sir George Jessel, "important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it."

thought has been expressed in our cases and has become a concomitant of due process.

> A fair trial in a fair tribunal is a basic requirement of due process. * * * [O]ur system of law has always endeavored to prevent even the probability of unfairness. *In re Murchison*, 349 U.S. 133, 136 (1955).

Moreover, can it be said that a holding in favor of the petitioner would cause a "floodgate" of similar cases in the federal courts? The answer is undoubtedly not. As the court below recognized[93] a precedential value of any holding in petitioner's favor would be limited at best. The operative facts would be limited to the State of New Jersey, where the constitution vests in the Chief Justice of the State's highest court the total and complete administrative control over judges of the trial level and the Appellate Division. Secondly, the present case alleges involvement by the Supreme Court with an attorney, who allegedly was the target of a state grand jury proceeding, who was summoned to appear before the Supreme Court minutes prior to a scheduled grand jury appearance. Lastly, it is alleged that prior to such appearance before the state's highest court, petitioner had resolved to invoke his Fifth Amendment rights before the grand jury. The questioning by the Supreme Court had been calculated to, and so unnerved him, that he was unable to exercise a free will. These are indeed extraordinary facts. Furthermore, a holding in petitioner's favor would only mandate that the facts herein are "extraordinary" in terms of *Younger* considerations. As such, there could be no precedential value to any future case, since each would have to stand on its own merits for such a legal determination.

93. *Id.* at 1198.

To insure against any hint of a recurrence of any similar conduct, a prophylactic remedy must obtain herein. Only through an injunction will the state authorities be put on notice that activities of this kind will never be tolerated and that prosecutions, once tainted, will never be allowed to continue on their repressive paths. For as has been said:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. • • • Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. *Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1955).

Furthermore, the prophylactic rule will remove the chilling effect on the Fifth Amendment rights by individuals in situations comparable to petitioner's who may be called to testify before a state grand jury. *Cf., State v. Falco*, 60 N.J. 570, 292 A.2d 23 (1972).

Petitioner deserves full vindication. The burdens placed upon him by the tainted state prosecution and the tainted indictment should be once and for all lifted, so that he may go back and pick up the scattered pieces of his wrecked personal and professional life.

CONCLUSION

The unique facts of this case, the law as found in *Younger v. Harris* and its companion cases, and in those cases that have followed *Younger*, lead inevitably to the conclusion that the present case involves "extraordinary circumstances" and that federal interference in the pending state criminal prosecution is not only mandated but compelled. Thus, this Court should enter an order permanently enjoining petitioner's state criminal prosecution or, in the alternative, remand this matter to the district court for further proceedings.

Respectfully submitted,

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